

**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 Hysni Gucati

**Date:** 2<sup>nd</sup> February 2021

**Language:** English

**Classification:** Public

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**Preliminary Motion Alleging Defects in the Form of the Indictment**

**Pursuant to Rule 97(1)(b)**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

## INTRODUCTION

1. On 14<sup>th</sup> December 2020, the Specialist Prosecutor filed the confirmed Indictment against Hysni Gucati (“Accused”)<sup>1</sup>. The Indictment charged the Accused with 7 counts<sup>2</sup>.
2. In accordance with Article 39(1) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 97(1)(b) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the Accused hereby alleges defects in the form of the indictment.

## BACKGROUND

3. In accordance with Rule 97(2) of the Rules, any preliminary motion alleging defects in the form of the indictment are to be brought within 30 days from the disclosure of all material and statements referred to in Rule 102(1)(a).
4. Rule 102(1)(a) requires the Specialist Prosecutor to make available to the Defence the “supporting material to the indictment” submitted for confirmation.
5. As defined in Rule 86(3), the “supporting material to the indictment” includes both: (a) evidentiary material supporting the material facts; and (b) a detailed outline demonstrating the relevance of each item of evidentiary material to

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<sup>1</sup> “Submission of confirmed Indictment with strictly confidential Annexes 1 and 2”, KSC-BC-2020-07/F00075

<sup>2</sup> “The Indictment”, KSC-BC-2020-07/F00075/A01, at paragraph 48

each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s).

6. On Monday 4<sup>th</sup> January 2021, the Specialist Prosecutor provided “Disclosure 2” under Rule 86(3)(a) and 102(1)(a) of the Rules.
7. On Friday 8<sup>th</sup> January 2021, the “detailed outline of the supporting materials” was made available to the defence pursuant to Rule 86(3)(b) and 102(1)(a) of the Rules.
8. Accordingly, the time limit for any such motion in the present case runs from the next working day after 8<sup>th</sup> January 2021<sup>3</sup>, namely Monday 11<sup>th</sup> January 2021, ending on Wednesday 10<sup>th</sup> February 2021.

## LAW

9. Rule 86(3) of the Rules requires the indictment to ‘set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged pursuant to Article 16 of the Law’.
10. The indictment must be sufficiently clear to enable the accused to understand the nature and cause of the charges brought against him<sup>4</sup>.
11. An indictment which fails to duly set forth the specific material facts underpinning the charges against the accused is defective<sup>5</sup>.

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<sup>3</sup> Rule 9(2) of the Rules

<sup>4</sup> *Prosecutor v Kanyabashi*, Decision on Defence Preliminary Motions for Defects in the Form of the Indictment, 31 May 2000, ICTR-96-15-1, para.5

<sup>5</sup> *Prosecutor v Nahimana*, Appeals Judgment, 28 November 2007, ICTR-99-52-A, para.322

12. Allegations within an indictment are defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and cause of the charges brought against him<sup>6</sup>.
13. Where it is alleged that the Accused has committed offences through, or with, others, those others should be sufficiently identified<sup>7</sup>, by name if their names are known<sup>8</sup>.
14. The indictment should contain the identity of any victim, where it is known<sup>9</sup>. Whenever possible, the Prosecutor should clearly indicate the precise line of conduct and mental element.
15. Phrases such as “including but not limited to” as well as other ambiguous phrases such as “among others” are to be avoided in order to ensure that the indictment is specific and not too vague for the purposes of identifying the crimes against which the accused must defend himself or herself<sup>10</sup>. Such phrases are “vague and subject to interpretation and they do not belong in the indictment when it is issued against the accused”<sup>11</sup>.

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<sup>6</sup> *Prosecutor v Karemena*, Decision on the Defence Motion pursuant to r.72 of the Rules of Procedure and Evidence, pertaining to *inter alia* Lack of Jurisdiction and Defects in the Form of the Indictment, 25 April 2001, ICTR-98-44-T, para.16

<sup>7</sup> *Prosecutor v Nahimana*, Appeal Judgment, 28 November 2007, ICTR-99-52-A para.323;

<sup>8</sup> *Prosecutor v Ayyash*, Decision Relating to the Examination of the Indictment of 10 June 2011 issued against Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra, 28 June 2011, STL-11-01/I, para.96; and *Archbold Criminal Pleading and Evidence 2021 Ed.* at paragraph 33-47

<sup>9</sup> *Prosecutor v Blaskic*, Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form thereof, 4 April 1997, IT-95-14, para.20.2

<sup>10</sup> *Prosecutor v Blaskic*, Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form thereof, 4 April 1997, IT-95-14, paras.22-24; *Prosecutor v Kanu*, Decision and Order on Defence Preliminary Motion for Defect in the Form of the Indictment, 19 November 2003, SCSL-2003-13-PT, para.17

<sup>11</sup> *Prosecutor v Blaskic*, Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form thereof, 4 April 1997, IT-95-14, para.22

## SUBMISSIONS

*Defect 1*

16. The alleged crimes are stated to be contrary to Articles 15(2) and 16(3) of the Law, and Chapters II, XXXI and XXXII of the Criminal Code of the Republic of Kosovo, Code No06/L-074 (2019)<sup>12</sup>.

17. Whereas Article 15(2) and 16(3) of the Law applies the offences in Chapter XXXII, Articles 384-386, 388, 390-407, Chapter XXXIII, Articles 409-411, 415, 417, 419 and 421, Chapter XXXIV, Articles 423-424, and the individual criminal responsibility provisions contained in Articles 8-10, 17, 21-24, and 27-40 of the Kosovo Criminal Code 2012, Law 04/L-82 to the official proceedings and officials of the Specialist Chambers, the Registry and Specialist Prosecutor's Office, where they relate to its official proceedings and officials, the Law does *not* apply the provisions of the 2019 Code Law 05/L-074.

18. As the Law has not been amended to apply the 2019 Code, the offences as presently stated in paragraph 48 of the Indictment are not known to the Law.

*Defect 2*

19. The indictment is littered with vague phrases that are ambiguous and do not enable the Accused to understand the case against him. Examples are set out in Table 1 below:

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<sup>12</sup> "The Indictment", KSC-BC-2020-07/F00075/A01, at page 3 of 18, and paragraph 48

Table 1

Paragraph 6	“... Hysni Gucati, Nasim Haradinaj, <i>and others</i> , without authorisation, disseminated confidential and non-public information relating to the confidential investigations of the Special Investigative Task Force (SITF) and SPO, encouraged <i>others</i> to further disseminate confidential and non-public information, and undertook <i>other actions</i> for the declared purpose of obstructing the SC/SPO”	Who is it alleged that the Accused, and Mr Haradinaj acted with?  Who is it alleged they encouraged?  What other actions are they alleged to have undertake?
Paragraph 11	“As part of such statements, Hysni Gucati <i>and/or</i> Nasim Haradinaj publicly: (i) confirmed etc.”	Is it alleged that the Accused publicly confirmed etc. or is it alleged that Mr Haradinaj did?
Paragraph 12	“... <i>certain contents</i> of the First Disclosure, <i>including</i> [REDACTED] <i>names and</i>	What is meant by <i>certain contents</i> ?

	<i>personal data, were further disseminated, including in the press and online."</i>	Which [REDACTED] names and what <i>personal data</i> were further disseminated in the press and online?  Is it alleged that anything of the First Disclosure other than witness names and personal data was further disseminated? If so, what?  Is it alleged that anything of the First Disclosure was further disseminated other than in the press and online? If so, how?
Paragraph 16	"...Hysni Guati, Nasim Haradinaj, and at least one other representative of the KLA WVA made multiple public statements relating to the First and Second Disclosure."	Which representatives of the KLA WVA and how many of them?
Paragraph 16	"As part of such statements, Hysni Guati, Nasim Haradinaj, and/or	Is it alleged that the Accused publicly acknowledged etc. or is it

	<p><i>other(s) publicly: (i) acknowledged etc. ..."</i></p>	<p>alleged that Mr Haradinaj did? Or is it alleged that another did? If so, who? And how many others?</p>
<p>Paragraph 20</p>	<p>"...Hysni Gucati and Nasim Haradinaj made multiple statements relating to the Third Disclosure. As part of such statements, Hysni Gucati <i>and/or</i> Nasim Haradinaj publicly: (i) confirmed etc. ..."</p>	<p>Is it alleged that the Accused publicly confirmed etc. or is it alleged that Mr Haradinaj did?</p>
<p>Paragraph 21</p>	<p>"... <i>contents</i> of the Third Disclosure, [REDACTED], were further disseminated, <i>including</i> in the press and online."</p>	<p>Which [REDACTED] were, and what [REDACTED] was, further disseminated in the press and online?</p> <p>Is it alleged that anything of the Third Disclosure other than [REDACTED] and [REDACTED] was further disseminated? If so, what?</p> <p>Is it alleged that anything of the Third Disclosure</p>



		was further disseminated other than in the press and online? If so, how?
Paragraph 22	“As a result of the First Disclosure, Second Disclosure, Third Disclosure and related events set out above, <i>witnesses and/or their family members</i> were intimidated.”	Is it alleged that witnesses were intimidated? If so, which witnesses?  Or is it alleged that witnesses’ family members were intimidated? If so, who?
Paragraph 25	“...Hysni Gucati, Nasim Haradinaj, and <i>certain others</i> (‘Associates’) by serious threat <i>and/or</i> common action, obstructed or attempted to obstruct SC proceedings. Hysni Gucati and Nasim Haradinaj organised and coordinated <i>the group</i> committing such acts.”	Who were the <i>certain others</i> (‘Associates’) who the Accused is said to have acted with?  Is it alleged that the Accused used serious threat? Or is it alleged that the Accused used common action?  Who is said to be within <i>the group</i> that the Accused is alleged to have organised and coordinated?

Paragraph 26	“...Hysni Gucati, Nasim Haradinaj, <i>and/or Associates</i> (i) disseminated the Confidential Information etc. ...”	<p>Is it alleged that the Accused disseminated the Confidential Information etc.?</p> <p>Or is it alleged that Mr Haradinaj disseminated the Confidential Information etc.?</p> <p>Or is it alleged that the <i>Associates</i> disseminated the Confidential Information etc.?</p> <p>Who are the <i>Associates</i> who may or may not have disseminated the Confidential Information etc. according to paragraph 26?</p>
Paragraph 26	“Hysni Gucati and Nasim Haradinaj also publicly encouraged, instructed, <i>and/or</i> advised <i>others, including</i> (i) <i>certain members of the public</i> ...”	<p>Is it alleged that the Accused publicly encouraged others?</p> <p>Or is it alleged that the Accused publicly instructed others?</p>

	<p>and (ii) <i>certain members of the press ...</i>"</p>	<p>Or is it alleged that the Accused advised others?</p> <p>Or is it alleged that the Accused did none of those things, but Mr Haradinaj did?</p> <p>If so, which of encouraging, instructing or advising is it alleged that Mr Haradinaj did?</p> <p>Which <i>certain members of the public</i> were alternatively encouraged, instructed or advised?</p> <p>Which <i>certain members of the press</i> were alternatively encouraged, instructed or advised?</p> <p>Is it alleged that anyone else in addition to the unidentified <i>certain members of the public</i> and</p>
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		<p><i>certain members of the press</i></p> <p>were alternatively encouraged, instructed or advised? If so, who?</p>
Paragraph 28	<p>"...the acts of Hysni Gucati, Nasim Haradinaj, <i>and/or Associates</i> obstructed or attempted to obstruct SC Proceedings ..."</p>	<p>Is it alleged that the acts of the Accused obstructed or attempted to obstruct SC Proceedings?</p> <p>Or is it alleged that the acts of Mr Haradinaj obstructed or attempted to obstruct SC Proceedings?</p> <p>Or is it alleged that it was the acts of <i>Associates</i> that obstructed or attempted to obstruct SC Proceedings, and if so, which <i>Associates</i> and how many?</p>
Paragraph 29	<p>"... Hysni Gucati, Nasim Haradinaj and <i>Associates</i> used serious threats ..."</p>	<p>Which <i>Associates</i> and how many?</p>
Paragraph 30	<p>"... on multiple occasions, Hysni Gucati, Nasim Haradinaj, <i>and/or Associates:</i> (i) [REDACTED] etc. ..."</p>	<p>Is it alleged that the Accused [REDACTED] etc.?</p> <p>Or Mr Haradinaj?</p>

		Or <i>Associates</i> , and if so, which <i>Associates</i> and how many?
Paragraph 30(v)	"... <i>certain members of the public...</i> "	Who?
Paragraph 30(vi)	"... <i>certain members of the public...</i> "	Who?
Paragraph 32	" <i>Witnesses and/or their family members were intimidated.</i> "	Is it alleged that witnesses were intimidated? If so, which witnesses?  Or is it alleged that witnesses' family members were intimidated? If so, who?
Paragraph 33	"...Hysni Gucati, Nasim Haradinaj and <i>Associates</i> , without authorisation, revealed Confidential Information."	Which <i>Associates</i> ?
Paragraph 33	"... (i) <i>certain members of the public...</i> and (ii) <i>certain members of the press</i> "	Which <i>members of the public</i> ?  Which <i>members of the press</i> ?

Paragraph 34	"...Hysni Gucati, Nasim Haradinaj, and <i>Associates</i> , etc. ..."	Which <i>Associates</i> ?
Paragraph 35	"...resulted in <i>serious consequences for the witnesses...</i> "	What were the <i>serious consequences</i> alleged, and which <i>witnesses</i> are alleged to have suffered those consequences?
Paragraph 39	"...Hysni Gucati, Nasim Haradinaj, <i>and/or Associates</i> committed the crimes in co-perpetration <i>and/or</i> agreed to commit the crimes."	Who is it alleged that the Accused committed the crimes with?  Mr Haradinaj, or the Associates, or neither?  Which <i>Associates</i> ?
Paragraph 41	"... Hysni Gucati and Nasim Haradinaj incited one another, <i>Associates</i> , and <i>certain others</i> to commit the crimes described above."	Which <i>Associates</i> is the Accused alleged to have incited to commit the crimes?  Who is meant by ' <i>certain others</i> '?
Paragraph 42	"... Hysni Gucati and Nasim Haradinaj incited one another, <i>Associates</i> , and <i>certain others</i> to commit the crimes of	Which <i>Associates</i> is the Accused alleged to have incited to commit the crimes?

	obstructing official persons ..."	Who is meant by 'certain others'?
Paragraph 43	"... Hysni Gucati and Nasim Haradinaj incited one another, <i>Associates</i> , and <i>certain others</i> to commit the crimes of obstructing official persons ..."	Which <i>Associates</i> is the Accused alleged to have incited to commit the crimes?  Who is meant by 'certain others'?
Paragraph 44	"... Hysni Gucati and Nasim Haradinaj provided assistance to one another, <i>Associates</i> and <i>certain others</i> in the commission of the crimes described above."	Which <i>Associates</i> is the Accused alleged to have assisted in the commission of the crimes?  Who is meant by 'certain others'?
Paragraph 45	"... Hysni Gucati, Nasim Haradinaj, and, as applicable, <i>Associates</i> and <i>others</i> intended the commission of the crimes described above..."	Which <i>Associates</i> intended the commission of the crimes?  Which <i>others</i> intended the commission of the crimes?
Paragraph 46	"... Hysni Gucati, Nasim Haradinaj, and, as applicable, <i>Associates</i> , and others: (i) were aware that the crimes described above could occur as a	Which <i>Associates</i> were aware that the crimes could occur as a result of their acts or omissions etc?  Whose acts or omissions?

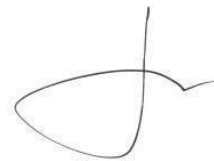
	result of their acts or omissions etc. ...”	Which <i>others</i> were aware that the crimes could occur as a result of their acts or omissions etc? Whose acts or omissions?
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## CONCLUSION

20. In light of the defects identified above, it is requested that:

- a. The indictment be clarified by means of an amended indictment, provided by the SPO addressing the defects, within 30 days from the date of decision on the motion (the right to thereafter raise objections to any amended indictment reserved to the defence); or otherwise
- b. The indictment be dismissed.

Word count: 2405 words



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2<sup>nd</sup> February 2021

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