



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:** 8 March 2021

**Language:** English

**Classification:** **Public**

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**Public Redacted Version of**

**Decision on Defence Preliminary Motions**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 39(1) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 97 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 25 and 26 September 2020, Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj") (collectively, the "Accused") were arrested in Kosovo and transferred to the Specialist Chambers' detention facilities in The Hague, the Netherlands.<sup>2</sup>

2. On 27 October 2020, the Single Judge issued a decision on, *inter alia*, challenges raised by the Defence for Mr Haradinaj to the jurisdiction of the Specialist Chambers ("SC").<sup>3</sup>

3. On 30 October 2020, the Specialist Prosecutor submitted for confirmation before the Pre-Trial Judge a strictly confidential and *ex parte* indictment ("Indictment") against Mr Gucati and Mr Haradinaj together with evidentiary material

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<sup>1</sup> 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.

<sup>2</sup> KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati*, 24 September 2020, public; F00012/A02/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00012/A03/COR/RED, Single Judge, *Public Redacted Version of the Corrected Version of Arrest Warrant for Nasim Haradinaj*, 24 September 2020, public; F00012/A04/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00015, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 September 2020, public; F00016, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 25 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; 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.

<sup>3</sup> KSC-BC-2020-07, F00057, Single Judge, *Decision on Defence Challenges* ("Defence Challenges Decision"), 27 October 2020, public.

supporting the material facts and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation (“Rule 86(3)(b) Outline”).<sup>4</sup>

4. On 11 December 2020, the Pre-Trial Judge confirmed in part the Indictment (“Confirmation Decision”) and ordered the Specialist Prosecutor’s Office (“SPO”) to submit a revised indictment, as confirmed (“Confirmed Indictment”).<sup>5</sup>

5. On 2 February 2021, the Defence for Mr Gucati, and on 4 February 2021, the Defence for Mr Haradinaj submitted their respective preliminary motions.<sup>6</sup>

6. On 10 February 2021, the SPO submitted one consolidated response to the two preliminary motions (“SPO Response”).<sup>7</sup>

7. On 15 February 2021, the Defence for Mr Haradinaj, and on 16 February 2021, the Defence for Mr Gucati submitted their respective replies to the SPO Response.<sup>8</sup>

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<sup>4</sup> KSC-BC-2020-07, F00063, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests* (“Submission of Indictment”), 30 October 2020, confidential, with Annexes 1 (“Indictment”) and 2 (“Rule 86(3)(b) Outline”), confidential.

<sup>5</sup> KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment* (“Confirmation Decision”), 11 December 2020, public.

<sup>6</sup> KSC-BC-2020-07, F00113, Defence for Mr Gucati, *Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b)* (“Gucati Preliminary Motion”), 2 February 2021 (incorrectly dated 30 January 2021), confidential. *See also* F00113/RED, Defence for Mr Gucati, *Public Redacted Version of the Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b)*, 3 February 2021, public; F00116, Defence for Mr Haradinaj, *Preliminary Motion on the Issue of the Indictment Being Defective* (“Haradinaj Preliminary Motion”), 4 February 2021 (incorrectly dated 3 February 2021), confidential.

<sup>7</sup> KSC-BC-2020-07, F00120, Specialist Prosecutor, *Consolidated Prosecution Response to Preliminary Motions* (“SPO Response”), 10 February 2021, confidential. *See also* F00120/RED, Specialist Prosecutor, *Public Redacted Version of Consolidated Prosecution Response to Preliminary Motions*, 22 February 2021.

<sup>8</sup> KSC-BC-2020-07, F00126, Defence for Mr Haradinaj, *Defence Reply to Prosecution Response to Preliminary Motion* (“Haradinaj Reply”), 15 February 2021, confidential; F00128, Defence for Mr Gucati, *Reply to Prosecution Response to Preliminary Motion* (“Gucati Reply”), 16 February 2021, confidential.

## II. APPLICABLE LAW

### A. PRELIMINARY MOTIONS

8. Pursuant to Article 39(1) of the Law, the Pre-Trial Judges rules on any preliminary motions, including challenges to the indictment and jurisdiction.

9. Pursuant to Rule 97(1) of the Rules, the Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which: (a) challenge the jurisdiction of the Specialist Chambers; (b) allege defects in the form of the indictment; and (c) seek the severance of indictments pursuant to Rule 89(2) of the Rules.

10. Pursuant to Rule 97(2) of the Rules, preliminary motions shall be in writing and shall be brought within thirty (30) days from the disclosure of all material and statements referred to in Rule 102(1)(a) of the Rules.

### B. INDICTMENT

11. Pursuant to Article 21(4)(a) of the Law, the Accused shall be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

12. Pursuant to Article 38(4) of the Law and Rule 86(3) of the Rules, an indictment must 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. The indictment shall be filed together with supporting material, i.e. evidentiary material supporting the facts underpinning the charges and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation.

### C. SUCCESSOR LEGISLATION

13. Pursuant to Article 64 of the Law, where a law referenced in the Law is repealed and replaced with successor legislation governing the same subject matter, such reference shall – unless the context clearly requires another interpretation – be interpreted as meaning such successor legislation and, where applicable, the analogous provision(s) thereof.

### III. SUBMISSIONS OF THE PARTIES

14. The Defence for Mr Gucati submits that the Confirmed Indictment is defective as the offences are not known to the Law and the Confirmed Indictment does not enable Mr Gucati to understand the case against him.<sup>9</sup> The Defence for Mr Gucati requests that the SPO submit an amended Confirmed Indictment addressing the alleged defects or that the Confirmed Indictment is dismissed.<sup>10</sup>

15. The Defence for Mr Haradinaj joins the aforementioned submissions.<sup>11</sup> Furthermore, the Defence for Mr Haradinaj raises a number of evidentiary and disclosure-related matters which would inform the time limit for filing preliminary motions.<sup>12</sup>

16. The SPO responds that both preliminary motions should be dismissed,<sup>13</sup> as the SC have jurisdiction over the charged offences and the Confirmed Indictment pleads the material facts of the SPO's case.<sup>14</sup> The SPO further responds to the evidentiary and disclosure-related matters raised by the Defence for Mr Haradinaj.<sup>15</sup>

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<sup>9</sup> *Gucati* Preliminary Motion, paras 16-19, including Table 1.

<sup>10</sup> *Gucati* Preliminary Motion, para. 20.

<sup>11</sup> *Haradinaj* Preliminary Motion, paras 62-67.

<sup>12</sup> *Haradinaj* Preliminary Motion, paras 39-41, 44-49, 71-75, 79-83.

<sup>13</sup> SPO Response, para. 1.

<sup>14</sup> SPO Response, para. 1.

<sup>15</sup> SPO Response, paras 2, 18.

17. In their respective replies, the Defence maintain the submissions made in their respective preliminary motions.<sup>16</sup> The Defence for Mr Gucati also joins some of the submissions made in reply by the Defence for Mr Haradinaj.<sup>17</sup>

#### IV. DISCUSSION

##### A. EVIDENTIARY AND DISCLOSURE-RELATED MATTERS

18. The Defence for Mr Haradinaj submits that (i) the material seized from the Kosovo Liberation Army War Veterans' Association (the "Batches") is the foundational evidence of the Confirmed Indictment and ought to have been submitted as supporting material under Rule 86(3) of the Rules;<sup>18</sup> (ii) even if the Batches were not submitted as such, they still constitute supporting material for the Indictment and they are subject to disclosure under Rule 102(1)(a) of the Rules;<sup>19</sup> and (iii) as a consequence, since disclosure has not been completed under Rule 102(1)(a) of the Rules,<sup>20</sup> the submission of preliminary motions at this stage is premature and a stay of proceedings is necessary until the aforementioned disclosure matter is addressed.<sup>21</sup>

19. The SPO responds that the deadline for preliminary motions ran from 4 January 2021, when disclosure under Rule 102(1)(a) of the Rules was completed.<sup>22</sup> The SPO further avers that the Batches were not relied upon as supporting material for the Indictment and the question of their disclosure does not affect the time limit for

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<sup>16</sup> *Haradinaj Reply*, paras 41-43; *Gucati Reply*, paras 17-18.

<sup>17</sup> *Gucati Reply*, para. 3.

<sup>18</sup> *Haradinaj Preliminary Motion*, paras 69, 71-72, 74-75; *Haradinaj Reply*, para. 9. The Defence for Mr Gucati joins these submissions. See *Gucati Reply*, para. 3.

<sup>19</sup> *Haradinaj Preliminary Motion*, paras 42, 68; *Haradinaj Reply*, paras 10-11. The Defence for Mr Gucati joins these submissions. See *Gucati Reply*, para. 3.

<sup>20</sup> *Haradinaj Preliminary Motion*, paras 39, 42, 44, 47, 80.

<sup>21</sup> *Haradinaj Preliminary Motion*, paras 45-46, 48-49, 78, 81-83.

<sup>22</sup> SPO Response, para. 2.

preliminary motions.<sup>23</sup> On this basis, the SPO submits that the request for a stay of proceedings is baseless, bordering on frivolous.<sup>24</sup>

20. The Defence replies by reiterating its arguments regarding the foundational value of the Batches.<sup>25</sup> The Defence for Mr Haradinaj further avers that the requested stay of proceedings is necessary, as it is not for the SPO to decide what is material to a defence, and that it is entirely proper in the context of adversarial proceedings to raise such concerns regarding disclosure.<sup>26</sup>

21. The Pre-Trial Judge notes at the outset that Rule 97 submissions are not the appropriate avenue for extensively litigating disclosure matters that are subject to other requests.<sup>27</sup> That being said, the Pre-Trial Judge shall address these submissions insofar as they relate to the review of the Indictment and to any ensuing disclosure obligations affecting the time limit for preliminary motions.

22. As regards the purported evidentiary function of the Batches, the Pre-Trial Judge clarifies at the outset that the SPO did not submit these documents to the Pre-Trial Judge as supporting material for the indictment under Rule 86(3) of the Rules. Neither did the Pre-Trial Judge find it necessary to request the SPO, under Rule 86(4)(a) of the Rules, to present the Batches as additional material in support of the charges. As noted

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<sup>23</sup> SPO Response, para. 2.

<sup>24</sup> SPO Response, para. 2.

<sup>25</sup> *Haradinaj* Reply, paras 9-11. The Defence for Mr Gucati joins these submissions. *See Gucati* reply, para. 3.

<sup>26</sup> *Haradinaj* Reply, paras 14-22.

<sup>27</sup> *See* KSC-BC-2020-07, F00110, Specialist Prosecutor, *Prosecution Submission on the Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 1 February 2021, confidential with Annexes 1-2, strictly confidential and *ex parte*; F00118, Specialist Prosecutor, *Submission of Additional Information Relevant to Filing KSC-BC-2020-07/F00110*, 9 February 2021, confidential, with Annex 1, confidential; F00122, Defence for Mr Gucati, *Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 11 February 2021, confidential; F00123, Defence for Mr Haradinaj, *Defence Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association (KSC-BC-2020-07/F00110) and Prosecution Request for Non-Disclosure of Certain Information Pertaining to Contact with Witnesses (KSC-BC-2020-07/F00107)*, 12 February 2021, confidential; F00130, Specialist Prosecutor, *Prosecution Consolidated Reply to Defence Responses to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association*, 19 February 2021, confidential.



in the Confirmation Decision, determining the existence of a well-grounded suspicion requires a conviction on the part of the Pre-Trial Judge, beyond mere theory or suspicion, but falling short of the certainty of a proven fact, that the offences have indeed occurred and that the suspect committed or participated in their commission.<sup>28</sup> To make such a determination in the present case, the Pre-Trial Judge had to be satisfied, *inter alia*, that the Batches contained confidential information, including [REDACTED]. Such a conclusion was apparent from the supporting material submitted by the SPO, including the statements of the Accused and their associates,<sup>29</sup> which rendered the examination of the content of the Batches unnecessary for the decision of the Pre-Trial Judge under Rule 86(4) of the Rules.

23. As regards the categorisation of the Batches for disclosure purposes, as they have not been submitted as supporting material for the Indictment under Rule 86(3) of the Rules, they do not constitute material to be disclosed under Rule 102(1)(a) of the Rules.<sup>30</sup>

24. As regards the time limit for preliminary motions, the Pre-Trial Judge notes that disclosure under Rule 102(1)(a) of the Rules was completed on 8 January 2021, when the Rule 86(3)(b) Outline, a component of the supporting material under Rule 86(3) of the Rules, was made available to the Defence.<sup>31</sup> The Pre-Trial Judge accordingly finds that the filing of the preliminary motions by the Defence on 2 and 4 February 2021 was

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<sup>28</sup> Confirmation Decision, para. 30.

<sup>29</sup> Confirmation Decision, paras 100, 102, 105. *See for example*, 084015-084026; 081344-01-TR-ET, pp. 5-6, 10 (Mr Haradinaj); 081344-02-TR-ET, pp. 5-7 (Mr Haradinaj); 081355-02-TR-ET, pp. 19, 21 (Mr Haradinaj); 082106-07-TR-ET, p. 1 (Mr Haradinaj); 081987-081988-ET, pp. 1-2 (Mr Gucati); 081931-02-TR-ET, p. 1 (Mr Klinaku); 081355-03-TR-ET, p. 2 (Mr Gashi).

<sup>30</sup> [REDACTED].

<sup>31</sup> On 8 January 2021, during the first status conference, the SPO indicated that disclosure under Rule 102(1)(a) of the Rules was completed on 4 January 2021. *See* KSC-BC-2020-07, Transcript, 8 January 2021, public, p. 92, lines 23-25. On the same date, the Pre-Trial Judge ordered the removal of the *ex parte* marking from the Submission of Indictment, Indictment and Rule 86(3)(b) Outline so as to be made available to the Defence. *See* Registry stamps on the aforementioned filings. Accordingly, the time limit under Rule 97(2) of the Rules ran from the first working day after this event (11 January 2021) until 9 February 2021.



within the prescribed time limit and was not premature. For the aforementioned reasons, the Pre-Trial Judge further finds that a stay in the proceedings is unwarranted as there are no outstanding issues affecting the time limit under Rule 97(2) of the Rules.

## B. CHALLENGES TO THE JURISDICTION OF THE SPECIALIST CHAMBERS

25. The Defence for Mr Gucati submits that the Confirmed Indictment is defective because the alleged offences are contrary to Articles 15(2) and 16(3) of the Law, as they are charged under the provisions of the Criminal Code of Kosovo, Law No. 06/L-074 (2019) ("2019 KCC").<sup>32</sup> As the Law has not been amended to apply the 2019 KCC, the offences as charged are not known to the Law.<sup>33</sup> The Defence for Mr Haradinaj joins these submissions,<sup>34</sup> adding that the arguments regarding the charged offences being unknown to the Law challenge in fact the jurisdiction of the SC.<sup>35</sup>

26. The SPO submits that the Defence's jurisdictional challenges seek to impermissibly re-litigate already decided matters, as the Single Judge has already found, in response to previous Defence challenges, that the SC have jurisdiction over the offences and modes of liability incorporated in Articles 6(2) and 15(2) of the Law, as renumbered in the 2019 KCC. The SPO further notes that the Defence did not seek leave to appeal the Single Judge's decision and fails now to demonstrate that reconsideration thereof is necessary.<sup>36</sup>

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<sup>32</sup> *Gucati* Preliminary Motion, paras 16-17; *Gucati* Reply, para. 5.

<sup>33</sup> *Gucati* Preliminary Motion, para. 18.

<sup>34</sup> *Haradinaj* Preliminary Motion, paras 62-64.

<sup>35</sup> *Haradinaj* Preliminary Motion, paras 65-67.

<sup>36</sup> SPO Response, para. 3, referring to the Defence Challenges Decision, para. 24.

27. The Defence for Mr Haradinaj replies that its challenges are not a re-litigation, but the first opportunity to raise such issues under Rule 97 of the Rules after the SPO's alleged completion of its disclosure obligations.<sup>37</sup>

28. The Pre-Trial Judge recalls at the outset that the previous challenges raised by the Defence for Mr Haradinaj concerned the SC's subject-matter jurisdiction over Article 387 of the 2019 KCC,<sup>38</sup> the SC's temporal jurisdiction over Articles 387, 388 and 392 of the 2019 KCC,<sup>39</sup> and the connection between the alleged acts of Mr Haradinaj and SC official proceedings and officials.<sup>40</sup> These challenges were brought in conjunction with the arrest warrant issued against Mr Haradinaj.<sup>41</sup> The challenge currently before the Pre-Trial Judge concerns the applicability before the SC of the 2019 KCC provisions referenced in the Confirmed Indictment as the legal basis for the charged offences and modes of liability, a question which bears upon the SC's jurisdiction as set out in Articles 6(2), 15(2) and 16(3) of the Law. The Pre-Trial Judge accordingly finds that, despite some overlaps, this challenge is both broader than and distinct from the previous challenges and falls under the scope of Rule 97(1)(a) of the Rules.

29. The Pre-Trial Judge notes that Articles 6(2) and 15(2) of the Law provide that the SC shall have jurisdiction over the offences of, *inter alia*, intimidation during criminal proceedings, retaliation, violating the secrecy of proceedings and obstructing official persons in performing official duties, with respective reference to Articles 395, 396, 400 and 409 of the Criminal Code of Kosovo, Law No. 04/L-082 ("2012 KCC"). Likewise, Article 16(3) of the Law provides that for offences under Article 15(2) of the

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<sup>37</sup> *Haradinaj Reply*, paras 23-29.

<sup>38</sup> KSC-BC-2020-07, F00030, Defence for Mr Haradinaj, *Initial Appearance, Preliminary Motion to Dismiss the Charges and Motion for Immediate Release* ("Request of Defence for Mr Haradinaj"), 29 September 2020, public, p. 6. *See also* Defence Challenges Decision, para. 22.

<sup>39</sup> Request of Defence for Mr Haradinaj, p. 6. *See also* Defence Challenges Decision, para. 22.

<sup>40</sup> Request of Defence for Mr Haradinaj, p. 4. *See also* Defence Challenges Decision, para. 22.

<sup>41</sup> Request of Defence for Mr Haradinaj, pp. 2-4.

Law, the individual criminal responsibility provisions contained in, *inter alia*, Articles 17, 28, 31-33 and 35 of the 2012 KCC shall apply.

30. The Pre-Trial Judge recalls that, in accordance with Article 3(4) of the Law, the express incorporation in the Law of the aforementioned provisions ensures their applicability before the SC. When any such provisions are replaced with successor legislation governing the same subject-matter, by virtue of Article 64 of the Law, the references thereto shall be interpreted as meaning such successor legislation and the analogous provisions thereof.

31. The Pre-Trial Judge further notes that the 2019 KCC entered into force on 14 April 2019 and replaced the 2012 KCC.<sup>42</sup> The alleged offences took place between 7 and 25 September 2020.<sup>43</sup> Accordingly, for the purpose of the present case, the reference to the aforementioned provisions of the 2012 KCC in Articles 6(2) and 15(2) of the Law must be interpreted as meaning the analogous provisions in the 2019 KCC. Such an interpretation must, however, comply with the following conditions: (i) the jurisdiction of the SC as envisaged by Article 162 of the Constitution and the Law must be preserved;<sup>44</sup> and (ii) the new provisions must govern the same subject matter and be analogous to those expressly incorporated in the Law, as provided in Article 64 of the Law.

32. As regards the first condition, the Pre-Trial Judge notes that the offences of intimidation during criminal proceedings, retaliation, violating the secrecy of

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<sup>42</sup> See Articles 433-434 of the 2019 KCC, published in the *Official Gazette of the Republic of Kosovo*, No. 2, 14 January 2019, Prishtinë/Priština.

<sup>43</sup> Confirmed Indictment, para. 48. See also Defence Challenges Decision, para. 24; Article 33(2) and (4) of the Kosovo Constitution; ECtHR, *Alimuçaj v. Albania*, Application No. 20134/05, [Judgment](#), 7 February 2012, para. 152: "The legal basis for the applicant's prosecution was therefore the criminal law applicable at the material time."

<sup>44</sup> The Pre-Trial Judge notes in this regard that the specific features of the SC and the SPO legal regimes, established in compliance with Kosovo's international obligations, ensure that, in their own specific context, the SC and SPO function in an autonomous manner for the realisation of their mandate. KSC-CC-2020-11, F00015, Specialist Chamber of the Constitutional Court, *Judgment on the Referral of Proposed Amendments to the Constitution of Kosovo*, 26 November 2020, public, paras 56-63.

proceedings and obstructing official persons in performing official duties, as referenced under Articles 6(2) and 15(2) of the Law, continue to be criminalised under the 2019 KCC.<sup>45</sup> The Pre-Trial Judge further notes that the charged modes of liability, as referenced under Article 16(3) of the Law, are also provided in the 2019 KCC.<sup>46</sup>

33. As regards the second condition, the Pre-Trial Judge first notes that the provisions of the successor legislation need not be identical to those being replaced, but, as provided in Article 64 of the Law, they ought to govern the same subject matter and they must be analogous, *i.e.* materially similar to the provisions referenced in the Law.<sup>47</sup> In this regard, the Pre-Trial Judge observes that, for the purpose of the present case, Articles 387, 388, 392 and 401 of the 2019 KCC govern the same subject matter as and are analogous to Articles 395, 396, 400 and 409 of the 2012 KCC, as they regulate the same respective offences, which remain materially similar to those referenced in Articles 6(2) and 15(2) of the Law. Likewise, Articles 17, 28, 31-33 and 35 of the 2019 KCC govern the same subject matter as and are analogous to Articles 17, 28, 31-33 and 35 of the 2012 KCC, as they regulate the same respective modes of liability, which remain materially similar to those referenced in Article 16(3) of the Law.

34. Accordingly, the Pre-Trial Judge finds that the current proceedings appropriately rest on Articles 17, 28, 31-33, 35, 387, 388, 392 and 401 of the 2019 KCC, corresponding to Articles 17, 28, 31-33, 35, 395, 396, 400 and 409 of the 2012 KCC.<sup>48</sup> The Defence challenge on the SC jurisdiction is therefore rejected.

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<sup>45</sup> See Articles 387, 388, 392 and 401 of the 2019 KCC.

<sup>46</sup> See Articles 17, 28, 31-33, 35 of the 2019 KCC.

<sup>47</sup> "Analogous" is defined as "[c]haracterized by correspondence to; resembling, or bearing comparison *with*; parallel, equivalent; comparable, similar", see *OED Online* (Oxford University Press, December 2020) <https://www.oed.com/view/Entry/7026?redirectedFrom=analogous#eid> accessed 8 March 2021.

<sup>48</sup> Confirmation Decision, paras 13-14, 21.

## C. CHALLENGES TO THE FORM OF THE INDICTMENT

### 1. General Standards

35. The Defence for Mr Gucati submits that the Confirmed Indictment is littered with vague phrases that are ambiguous and do not enable the Accused to understand the case against him.<sup>49</sup> For this reason, the Defence for Mr Gucati requests that the Confirmed Indictment is either amended or dismissed.<sup>50</sup> The Defence for Mr Haradinaj joins these submissions.<sup>51</sup>

36. The SPO responds that, considering the nature of the alleged crimes and the circumstances of the case, the Confirmed Indictment pleads the material facts necessary to fulfil the elements of the alleged crimes and modes of liability and does so with sufficient specificity to enable the Accused to understand the case against them and prepare a defence.<sup>52</sup> The SPO further avers that the Confirmed Indictment describes in great detail the context, timing, content and circumstances of the Accused's statements and conduct, the contents of the confidential information disseminated, the common purpose or agreement, and the Accused's mental state.<sup>53</sup> The SPO submits that further evidentiary details have been produced to the Defence in the Rule 86(3)(b) Outline, the Confirmation Decision and disclosed materials and are to be produced in the Pre-Trial Brief and future disclosures.<sup>54</sup> According to the SPO, the combined information so provided enables the Defence to prepare fully and any amendment of the Confirmed Indictment at this stage is unnecessary.<sup>55</sup>

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<sup>49</sup> *Gucati* Preliminary Motion, para. 19 and Table 1. To support its argument, the Defence for Mr Gucati also refers to relevant case-law, *see* paras 10-15.

<sup>50</sup> *Gucati* Preliminary Motion, para. 20.

<sup>51</sup> *Haradinaj* Preliminary Motion, paras 62-64. To support its argument, the Defence for Mr Haradinaj also refers to relevant case-law, *see* paras 52-61.

<sup>52</sup> SPO Response, para. 4.

<sup>53</sup> SPO Response, para. 5.

<sup>54</sup> SPO Response, para. 17.

<sup>55</sup> SPO Response, para. 17.

37. The Defence for Mr Haradinaj replies that, without an amendment of the Confirmed Indictment, the Defence is precluded from bringing a proper challenge and the Accused's rights to a fair trial are breached.<sup>56</sup> The Defence for Mr Gucati replies that, while it accepts that details in an indictment need only be pleaded "as far as possible" and "if known", it maintains its submissions that the Confirmed Indictment fails to do so.<sup>57</sup> The Defence for Mr Gucati further joins the aforementioned submissions of the Defence for Mr Haradinaj.<sup>58</sup>

(a) Specificity and Clarity

38. The Pre-Trial Judge recalls that, in accordance with Articles 21(4)(a) and 38(4) of the Law as well as Rule 86(3) of the Rules, an indictment must set forth with sufficient specificity and clarity the facts underpinning the charges and the crimes, including the modes of liability charged.<sup>59</sup> Such specificity and clarity must ensure that the indictment, as a stand-alone document,<sup>60</sup> provides an accused with sufficient information to understand clearly and fully the nature and cause of the charges against him, with a view to preparing an adequate defence.<sup>61</sup> An accused

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<sup>56</sup> *Haradinaj Reply*, paras 35-36, 40.

<sup>57</sup> *Gucati Reply*, paras 6-7.

<sup>58</sup> *Gucati Reply*, para. 18.

<sup>59</sup> KSC-BC-2020-06, F00010, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules* ("*Thaçi et al.* Rule 86(4) Order"), 2 July 2020, public, para. 10.

<sup>60</sup> *Thaçi et al.* Rule 86(4) Order, para. 11.

<sup>61</sup> Confirmation Decision, para. 26. See also *Thaçi et al.* Rule 86(4) Order, public, paras 9, 11. ECtHR, *Mattoccia v. Italy*, no. 23969/94, [Judgment](#), 25 July 2000, para. 60; Similarly, ICTR, *Prosecutor v. Nsengiyumva*, ICTR-96-12-I, Trial Chamber, [Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment](#), 12 May 2000, para. 1, p. 6; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeals Chamber, [Judgment](#) ("*Kupreškić Appeal Judgment*"), 23 October 2001, para. 88; ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeals Chamber, [Judgment](#) ("*Ntagerura Appeal Judgment*"), 7 July 2006, para. 22; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Pre-Trial Judge, *Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra*, 28 June 2011, para. 27; ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-143-tENG, Pre-Trial Chamber I, [Decision on the Defence Request Concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges](#) ("*Al Hassan 5 October 2018 Decision*"), 5 October 2018, para. 30; *Prosecutor v. Yekatom and Ngaiissona*, ICC-01/14-01/18-199, Pre-Trial Chamber II, [Decision on the](#)



should accordingly not be required to consult other documents in order to understand and piece together the factual allegations underpinning the charges.<sup>62</sup>

39. Whether a fact underpins any particular charge and must accordingly be pleaded in the indictment with specificity cannot be decided in the abstract, but on a case-by-case basis, taking into account, *inter alia*, the nature and scale of the crimes charged, the circumstances of the case, the alleged proximity of the accused to the events and the mode of liability charged.<sup>63</sup> Nonetheless, in some instances, it cannot be excluded that certain details of the case, such as the number and identity of victims,<sup>64</sup> would remain obscure even after the end of the trial.<sup>65</sup> In any event, when determining whether an indictment fulfils the above conditions, it must be considered as a whole and select paragraphs or phrases should be read in the context of the entire document.<sup>66</sup>

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[“Prosecution’s Request to Postpone the Confirmation Hearing and All Related Disclosure Deadlines”](#) (“*Yekatom and Ngaïssona* 15 May 2019 Decision”), 15 May 2019, paras 41-42.

<sup>62</sup> *Thaçi et al.* Rule 86(4) Order, para. 11.

<sup>63</sup> Similarly, ICTY, [Kupreškić Appeal Judgment](#), para. 89; *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Chamber, [Judgment](#) (“*Blaškić Appeal Judgment*”), 29 July 2004, para. 210; ICTR, [Ntagerura Appeal Judgment](#), para. 23; *Prosecutor v. Uwinkindi*, ICTR-01-75-AR72(C), Appeals Chamber, [Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment](#) (“*Uwinkindi* 16 November 2011 Decision”), 16 November 2011, paras 4-5; ICC, [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Trial Chamber VI, [Judgment](#) (“*Ntaganda Trial Judgment*”), 8 July 2019, para. 38; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-585, Trial Chamber V, [Decision on the Yekatom Defence Motion for Additional Details](#), Trial Chamber V, 13 July 2020, para. 19; *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/04-01/18-874, Appeals Chamber, [Judgment on the Appeal of Mr Alfred Yekatom Against the Decision of Trial Chamber V of 29 October 2020 Entitled ‘Decision on Motions on the Scope of the Charges and the Scope of Evidence at Trial’](#) (“*Yekatom and Ngaïssona* 5 February 2021 Decision”), 5 February 2021, para. 54.

<sup>64</sup> ECtHR, *Sampech v. Italy*, no. 55546/09, [Décision](#) (“*Sampech* 19 May 2015 Decision”), 19 May 2015, para. 110. Similarly, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Appeals Chamber, [Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction](#) (“*Lubanga Appeal Judgment*”), 1 December 2014, para. 123; [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), para 41.

<sup>65</sup> ECtHR, *Previti v. Italy*, no. 45291/06, [Décision sur la recevabilité](#), 8 December 2009, para. 208. Similarly, STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Trial Chamber, [Decision on Alleged Defects in the Form of the Indictment](#) (“*Ayyash* 28 September 2020 Decision”), 28 September 2020, para. 54(b).

<sup>66</sup> Similarly, ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Appeals Chamber, [Judgment](#), 26 May 2003, para. 304; *Gacumbitsi v. Prosecutor*, ICTR-2001-64-A, Appeals Chamber, [Judgment](#), 7 July 2006, para. 123; *Prosecutor v. Seromba*, ICTR-2001-66-A, Appeals Chamber, [Judgment](#), 12 March 2008, para. 27; *Prosecutor*



40. Furthermore, a clear difference must be drawn between facts underpinning the charges, which must be pleaded as provided above, and evidence proffered to prove them.<sup>67</sup> The indictment need not set out the evidence by which the facts underpinning the charges are to be proven.<sup>68</sup> Such evidence will be disclosed according to the relevant provisions. Any disputes as to issues of fact are for determination at trial and not via preliminary motions relating to the form of the indictment.<sup>69</sup> At any rate, 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.<sup>70</sup>

(b) Particulars

41. Where the offences allegedly committed by an accused are, by their nature, directed against a group or collectivity of people, the accused must be provided with as much detailed information as possible regarding: the places, times and approximate number of victims; the necessary particulars to make out the elements of the offences, such as the accused's alleged conduct giving rise to

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*v. Prlić et al.*, IT-04-74-A, Appeals Chamber, [Judgement](#) (“Prlić et al. Appeal Judgment”), 29 November 2017, para. 27; STL, [Ayyash 28 September 2020 Decision](#), para. 14; ICC, [Yekatom and Ngaïssona 5 February 2021 Decision](#), para. 54.

<sup>67</sup> Similarly, ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Chamber, [Judgement](#) (“Furundžija Appeal Judgment”), 21 July 2000, para. 153; [Blaškić Appeal Judgment](#), para. 210; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, Appeals Chamber, [Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor Against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55\(2\) of the Regulations of the Court”](#), 8 December 2009, footnote 163.

<sup>68</sup> Similarly, ICTY, [Furundžija Appeal Judgment](#), para. 147; [Kupreškić Appeal Judgment](#), para. 88; [Prlić et al. Appeal Judgment](#), para. 27.

<sup>69</sup> Similarly, ICTY, *Prosecutor v. Kunarac*, IT-96-23, Trial Chamber, [Decision on the Form of Indictment](#), 4 November 1999, para. 13; *Prosecutor v. Krajišnik*, IT-00-39, Trial Chamber, [Decision Concerning Preliminary Motion on the Form of the Indictment](#), 1 August 2000, para. 8; STL, [Ayyash 28 September 2020 Decision](#), para. 14. See also ECtHR, [Sampech 19 May 2015 Decision](#), para. 110.

<sup>70</sup> See Rules 86(3), (5) and 95(4) of the Rules. Similarly, see ICC, [Lubanga Appeal Judgment](#), para. 124; [Ntaganda Trial Judgment](#), para. 37.

criminal responsibility and the related mental element; and the identities of any alleged co-perpetrators, if known.<sup>71</sup>

42. Where the actual identity of co-perpetrators cannot be established, they can be identified by pseudonym,<sup>72</sup> affiliation,<sup>73</sup> or group delimited by geographic, temporal or other parameters.<sup>74</sup> In any event, there is no requirement to identify all individuals involved in the offences who are not considered to be co-perpetrators of the charged offences.<sup>75</sup> Where an accused is charged with a form of accomplice liability, the indictment must plead with specificity the acts by which the accused allegedly planned, instigated, ordered or aided and abetted the offence.<sup>76</sup> In case of instigation, the instigated persons or group of persons must also be described precisely.<sup>77</sup>

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<sup>71</sup> *Thaçi et al.* Rule 86(4) Order, para. 18. Similarly, ICC, [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42; [Lubanga Appeal Judgment](#), para. 123.

Conversely, when alleging that an accused personally carried out the acts underlying the crime charged, it is necessary to set out, as far as possible, and with “the greatest precision”: the identity of the victim(s); the place and approximate date of the alleged acts; the manner and means by which they were committed and the related mental element. See, *Thaçi et al.* Rule 86(4) Order, para. 17. Similarly, ICTY, *Prosecutor v. Krnojelac*, IT-97-25, Trial Chamber, [Decision on Preliminary Motion on Form of Amended Indictment](#), 11 February 2000, para. 18; [Blaškić Appeal Judgment](#), para. 213.; SCSL, *Prosecutor v. Brima et al.* (AFRC case), SCSL-2004-16-A, Appeals Chamber, [Judgment](#), 22 February 2008, para. 38; ICTR, *Bagosora et al. v. Prosecutor*, ICTR-98-41-A, Appeals Chamber, [Judgment](#), 14 December 2011, para. 132; ICC, [Lubanga Appeal Judgment](#), paras 122-123; [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42.

<sup>72</sup> Similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Trial Chamber, [Decision on Alleged Defects in the Form of the Amended Indictment](#) (“*Ayyash et al.* 12 June 2013 Decision”), 12 June 2013, para. 41.

<sup>73</sup> Similarly, ICTR, *Simba v. Prosecutor*, ICTR-01-76-A, Appeals Chamber, [Judgment](#) (“*Simba Appeal Judgment*”), 27 November 2007, para. 72; *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Appeals Chamber, [Judgment](#) (“*Munyakazi Appeal Judgment*”), 28 September 2011, para. 162.

<sup>74</sup> Similarly, ICTR, [Simba Appeal Judgment](#), paras 71-72; [Munyakazi Appeal Judgment](#), para. 162.

<sup>75</sup> Similarly, ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-648, Pre-Trial Chamber I, [Decision on the Three Defences’ Requests Regarding the Prosecution’s Amended Charging Document](#), 25 June 2008, para. 24; STL, [Ayyash et al. 12 June 2013 Decision](#), para. 40; [Ayyash 28 September 2020 Decision](#), para. 51.

<sup>76</sup> Similarly, ICTR, *Prosecutor v. Ntagerura*, Trial Chamber, [Judgment and Sentence](#) (“*Ntagerura Trial Judgment*”), 25 February 2004, para. 33; ICTY, [Blaškić Appeal Judgment](#), para. 213.

<sup>77</sup> Similarly, ICTY, [Blaškić Appeal Judgment](#), para. 226.

43. The nature and scale of the alleged offences may make the determination of the identity of victims impossible.<sup>78</sup> In such cases, the identification of the victims as a group or the indication of their approximate number is sufficient.<sup>79</sup>

44. Open-ended statements in respect of the facts underpinning the charges (such as “including, but not limited to”) are not permitted,<sup>80</sup> unless they are exceptionally necessary given the circumstances of the case or the nature and scale of the offences and they do not create ambiguity as regards the charged offences.<sup>81</sup>

45. Alternative formulations such as “and/or” are permitted as long as they pertain to evidentiary material to be determined at trial,<sup>82</sup> and do not create ambiguity as regards the charged offences or modes of liability.<sup>83</sup>

#### (c) Defective Indictment

46. An indictment is defective when it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear manner, creating ambiguity as regards the pleaded charges, including the modes of liability, and thus impairing the Defence’s ability to prepare.<sup>84</sup>

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<sup>78</sup> Similarly ICTR, *Rucundo v. Prosecutor*, ICTR-2001-70-A, Appeals Chamber, [Judgement](#) (“Rucundo Appeal Judgment”), 20 October 2010, para. 160; *Prosecutor v. Renzaho*, ICTR-97-31-A, Appeals Chamber, [Judgement](#), 1 April 2011, para. 467.

<sup>79</sup> Similarly, ICTR, [Ntagerura Trial Judgment](#), para. 32; [Rucundo Appeal Judgment](#), para. 160; ICC, [Al Hassan 5 October 2018 Decision](#), para. 30; [Yekatom and Ngaïssona 15 May 2019 Decision](#), paras 41-42.

<sup>80</sup> *Thaçi et al.* Rule 86(4) Order, para. 18; Similarly, ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Pre-Trial Chamber I, [Decision on the Confirmation of Charges](#), 16 December 2011, paras 82-83; *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Pre-Trial Chamber II, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, paras 99, 101 and 103; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382-Red, Pre-Trial Chamber II, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, para. 106.

<sup>81</sup> Similarly, ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30-PT, Trial Chamber, [Decision on Defence Preliminary Motions on the Form of the Indictment](#) (“Kvočka et al. 12 April 1999 Decision”), 12 April 1999, para. 26.

<sup>82</sup> Similarly, ICTY, [Kvočka et al. 12 April 1999 Decision](#), para. 26.

<sup>83</sup> Similarly, ICTR, [Uwinkindi 16 November 2011 Decision](#), para. 48.

<sup>84</sup> Similarly, ICTY, *Prosecutor v. Galić*, IT-98-29-AR72, Appeals Chamber, [Decision on Application by Defence for Leave to Appeal](#), 30 November 2001, para. 11; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeals

47. The Pre-Trial Judge accordingly notes that the aforementioned findings will inform and guide the ensuing assessment of the alleged concrete deficiencies of the Confirmed Indictment.

## 2. Co-Perpetrators, Accomplices and Assisted or Incited Persons

48. The Defence for Mr Gucati submits that the Confirmed Indictment does not provide details on the identity<sup>85</sup> and number<sup>86</sup> of co-perpetrators and accomplices. Furthermore, the Defence for Mr Gucati submits that the identity of assisted or incited persons is not provided in the Confirmed Indictment.<sup>87</sup> The Defence for Mr Haradinaj joins these submissions.<sup>88</sup>

49. The SPO responds that its case does not depend on the identity of any co-perpetrator, accomplice or assisted/incited person and that such individuals are adequately identified as a group.<sup>89</sup> As regards co-perpetrators and accomplices, the SPO submits that further specificity is both unnecessary and impossible, given the

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Chamber, [Judgment](#), 28 February 2005, para. 31; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Chamber, [Judgement](#), 2 March 2009, para. 329.

<sup>85</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to the following paras and terms used in the Confirmed Indictment: 6 (“others”), 16 (“and at least one other representative of the KLA WVA”; “others”), 25 (“certain others (‘Associates’)”; “group”), 26 (“Associates”), 28 (“Associates”), 29 (“Associates”), 30 (“Associates”), 33 (“Associates”), 34 (“Associates”), 39 (“Associates”), 41 (“Associates”), 42 (“Associates”), 43 (“Associates”), 44 (“Associates”), 45 (“Associates”) and 46 (“Associates”).

<sup>86</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to paras 16 and 28-30 of the Confirmed Indictment.

<sup>87</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to the following paras and terms used in the Confirmed Indictment: 6 (“others”), 26 (“others, including (i) certain members of the public [...] and (ii) certain members of the press”), 30(v) (“certain members of the public”), 30(vi) (“certain members of the press”), 33 (“(i) certain members of the public [...] and (ii) certain members of the press”), 41 (“certain others”), 42 (“certain others”), 43 (“certain others”), 44 (“certain others”), 45 (“others”) and 46 (“others”).

<sup>88</sup> *Haradinaj* Preliminary Motion, paras 62-64.

<sup>89</sup> SPO Response, paras 6, 10-11, 13.

context of the events and the existing evidence.<sup>90</sup> As regards assisted or incited persons, the SPO avers that such persons are identified by group to include those members of the press and public who were present at, observed or participated in specifically identified press conferences and other public events.<sup>91</sup> In this regard the SPO submits that further specificity is unnecessary, impracticable and impossible, given the context of the events, the alleged public and indiscriminate nature of the Accused's statements and the existing evidence.<sup>92</sup>

50. The Defence for Mr Gucati replies that the SPO ought to identify as far as possible the alleged co-perpetrators, accomplices and assisted or incited persons who can be identified on the existing evidence.<sup>93</sup>

51. As regards the identity of co-perpetrators and accomplices, the Pre-Trial Judge notes at the outset that the nature and circumstances of the present case must be taken into consideration when determining the degree of specificity required in identifying such individuals. Accordingly, while the events in the Confirmed Indictment revolve around the alleged acts and statements of the two Accused, other individuals are also alleged to have been involved in different ways and to varying extent. The nature of the purported events, such as the holding of press conferences and broadcasted events, and the number of persons the two Accused allegedly involved in the events do not allow for the identification of each co-perpetrator or accomplice by name, as the Accused themselves refer to them in a generic way.<sup>94</sup> Nevertheless, the Confirmed Indictment identifies these individuals by group, partaking in a number of actions between 7 and 25 September 2020 in connection with or in the aftermath of the three disclosures.<sup>95</sup> Furthermore, the Confirmed Indictment identifies at least one

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<sup>90</sup> SPO Response, para. 11.

<sup>91</sup> SPO Response, para. 12.

<sup>92</sup> SPO Response, para. 13.

<sup>93</sup> *Guhati* Reply, paras 9-11.

<sup>94</sup> Confirmation Decision, fn. 165. *See also* 081358-01-ET, p. 8; 081344-01-TR-ET, p. 1.

<sup>95</sup> Confirmed Indictment, paras 6-7, 16, 30.

individual from the aforementioned group also by affiliation, *i.e.* as a representative of the KLA WVA.<sup>96</sup> Since the charged offences and modes of liability depend solely on the conduct of the two Accused and, as regards Count 6, on the conduct of at least one more person,<sup>97</sup> additional details as regards co-perpetrators or accomplices need not be pleaded further in the Confirmed Indictment and can be addressed at trial. To that end, additional evidentiary details regarding the names of identifiable individuals are contained in the Rule 86(3)(b) Outline and the Confirmation Decision.<sup>98</sup>

52. As regards the identity of assisted or incited persons, the Pre-Trial Judge notes at the outset that the nature of the present case and the alleged proximity of the Accused to the events must be taken into consideration when determining the degree of specificity required in identifying such individuals. Accordingly, the present case involves a series of statements by the two Accused, allegedly made on the occasion of three press conferences and other broadcasted events, through which they publicly addressed a large collectivity of individuals, including those present at the aforementioned events, encouraging, advising, instructing or urging them to take certain actions.<sup>99</sup> In particular, their alleged statements targeted members of the press in general, who were encouraged or urged to further disseminate the three disclosures. Equally, the Accused allegedly addressed general, public invitations to any person in possession of or with access to confidential information relating to the SC or SPO to continue providing such information to the KLA WVA. In any event, since the charged offences and modes of liability depend solely on the conduct of the two Accused and, as regards some modes of liability,<sup>100</sup> on the resulting or attempted

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<sup>96</sup> Confirmed Indictment, para. 16.

<sup>97</sup> Confirmation Decision, paras 74-75.

<sup>98</sup> Rule 86(3)(b) Outline, pp. 2, 6-7, 23, 26, 29, 35; Confirmation Decision, para. 100, fns. 57-60, 79-80, 82, 108, 161, 163, 197.

<sup>99</sup> Confirmed Indictment, paras 6, 9, 13-14, 17-18, 26, 30(v), 30(vi), 33.

<sup>100</sup> Confirmed Indictment, paras 41 (incitement), 42 (incitement with attempted commission) and 44 (assistance).



conduct, such as the publication of confidential material,<sup>101</sup> additional details as to the names of the assisted or incited persons need not be pleaded further in the Confirmed Indictment and can be addressed at trial.

53. The Pre-Trial Judge accordingly finds that the references in the Confirmed Indictment to co-perpetrators, accomplices and assisted or incited persons are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability.

### **3. Witnesses, Family Members and Serious Consequences Therefor**

54. The Defence for Mr Gucati submits that the Confirmed Indictment does not identify the allegedly intimidated witnesses or their family members,<sup>102</sup> nor the serious consequences suffered by such witnesses.<sup>103</sup> The Defence for Mr Haradinaj joins these submissions.<sup>104</sup>

55. The SPO responds that its case does not depend on the identity of any witness or family member nor does it rely on any individualised consequence therefor.<sup>105</sup> The SPO further avers that the persons allegedly intimidated are identified as a group and the consequences therefor are adequately described.<sup>106</sup> According to the SPO, further specificity is unnecessary, impracticable and impossible, given the specific pleading of the statements and conduct resulting in intimidation and its consequences, the alleged public and indiscriminate nature of the Accused's statements and the existing

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<sup>101</sup> Confirmed Indictment, paras 12, 21.

<sup>102</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to the following paras and terms used in the Confirmed Indictment: 22 ("witnesses and/or their family members") and 32 ("witnesses and/or their family members").

<sup>103</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to para. 35 ("resulted in serious consequences for the witnesses") of the Confirmed Indictment.

<sup>104</sup> *Haradinaj* Preliminary Motion, paras 62-64.

<sup>105</sup> SPO Response, paras 6, 16.

<sup>106</sup> SPO Response, para. 16.



evidence.<sup>107</sup> The SPO further submits that providing further detail would pose a concrete and grave risk to the security of witnesses and family members affected.<sup>108</sup>

56. The Defence for Mr Haradinaj replies that, in order to challenge an allegation of intimidation, the Defence must know the identity of the witness and how such witness was threatened or intimidated,<sup>109</sup> and the SPO must adduce evidence in this regard.<sup>110</sup> The Defence for Mr Haradinaj further states that, intimidation being an offence of specific intent, an allegation in this regard cannot be broadly stated as against such a wide class or group of individuals.<sup>111</sup> The Defence for Mr Gucati joins these submissions and adds that the SPO ought to identify as far as possible the alleged witnesses and family members who can be identified on the existing evidence.<sup>112</sup> The Defence for Mr Gucati further avers that any necessary redactions to the identity of such individuals can be dealt with in accordance with the redaction regime set out by the Pre-Trial Judge.<sup>113</sup>

57. The Pre-Trial Judge notes at the outset that the nature of the present case and the alleged proximity of the Accused to the events must be taken in consideration when determining the degree of specificity required in identifying witnesses and their family members. Accordingly, the present case involves three press conferences and other broadcasted events, on the occasion of which large quantities of confidential documents, [REDACTED],<sup>114</sup> was allegedly disseminated,<sup>115</sup> and a number of alleged accusations [REDACTED] were publicly made.<sup>116</sup> Accordingly, these actions and statements addressed a large collectivity of individuals – any person who provided or

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<sup>107</sup> SPO Response, para. 16.

<sup>108</sup> SPO Response, para. 16.

<sup>109</sup> *Haradinaj* Reply, paras 34, 38-39.

<sup>110</sup> *Haradinaj* Reply, paras 32-33.

<sup>111</sup> *Haradinaj* Reply, para. 34.

<sup>112</sup> *Gucati* Reply, paras 8, 15.

<sup>113</sup> *Gucati* Reply, para. 16.

<sup>114</sup> [REDACTED].

<sup>115</sup> Confirmed Indictment, paras 8-9, 13-14, 17-18.

<sup>116</sup> Confirmed Indictment, paras 11(iv), 16(viii), 30(iv), 40(vi).

could potentially provide information to the SPO or SC. Moreover, while the Accused personally undertook the alleged actions and made the alleged statements, they were in no physical proximity to any person affected by their conduct. Against this background, additional details as to the identification of these witnesses or their family members need not be pleaded further in the Confirmed Indictment and can be addressed at trial. Moreover, it is recalled that further evidentiary details regarding these witnesses and their family members are contained in the supporting material and the Confirmation Decision.<sup>117</sup> [REDACTED].<sup>118</sup>

58. As regards the reference to serious consequences on witnesses and their family members, the Pre-Trial Judge notes that this phrase appears in paragraph 35 of the Confirmed Indictment, which specifically refers to paragraphs 22 and 32, which indicate that the safety, privacy, reputations and livelihood of the witnesses or their family members were threatened. Since it is the occurrence rather than the specific content of “serious consequences” that forms the aggravated form of Count 2, additional details as to the forms through which such serious consequences materialised need not be pleaded further in the Confirmed Indictment and can be addressed at trial.<sup>119</sup>

59. As regards the use of the alternative formulations “and/or” in relation to witnesses and their family members,<sup>120</sup> the Pre-Trial Judge considers that this constitutes an evidentiary matter and can be addressed at trial.<sup>121</sup>

60. The Pre-Trial Judge accordingly finds that the references in the Confirmed Indictment to witnesses and/or their family members as well as the serious

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<sup>117</sup> 084008-084010; Confirmation Decision, para. 107.

<sup>118</sup> [REDACTED].

<sup>119</sup> [REDACTED].

<sup>120</sup> Confirmed Indictment, paras 22, 32.

<sup>121</sup> See also *infra* para. 63.

consequences therefor are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability.

#### **4. Alternative Formulations Regarding the Accused or Associates (“and/or”)**

61. The Defence for Mr Gucati submits that, by using the formula “and/or”, the Confirmed Indictment does not specify which Accused or Associate engaged in the indicated conduct,<sup>122</sup> and, where alternative conduct is specified, which of the indicated acts refer to Mr Gucati.<sup>123</sup> The Defence for Mr Haradinaj joins these submissions.<sup>124</sup>

62. The SPO responds that alternative characterisation of facts, including through the use of “and/or” does not, in and of itself, create ambiguity or impair the ability of the Defence to prepare and that such characterisation constitutes an evidentiary matter to be determined at trial.<sup>125</sup>

63. The Pre-Trial Judge notes that the formula “and/or” is used in the Confirmed Indictment to refer alternatively to the Accused, co-perpetrators or accomplices when describing a list of actions undertaken,<sup>126</sup> or to identify alternative courses of conduct.<sup>127</sup> The Pre-Trial Judge further observes that such formulations, when read in the context of the whole Confirmed Indictment,<sup>128</sup> provide sufficient notice as regards the conduct of the Accused through which the charged offences have been allegedly committed and by which the charged modes of liability allegedly materialised.

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<sup>122</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to paras 11, 16, 20, 26, 28, 30 and 39 in the Confirmed Indictment.

<sup>123</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to paras 25-26 and 39 in the Confirmed Indictment.

<sup>124</sup> *Haradinaj* Preliminary Motion, paras 62-64.

<sup>125</sup> SPO Response, para. 8.

<sup>126</sup> Confirmed Indictment, paras 11, 16, 20, 26, 28, 30 and 39.

<sup>127</sup> Confirmed Indictment, paras 25-26 and 39.

<sup>128</sup> Confirmed Indictment, para. 49.

Accordingly, which of the alternative factual allegations are supported by evidence can be addressed at trial.

64. The Pre-Trial Judge accordingly finds that the aforementioned alternative formulations are, in these specific instances, sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability.

### **5. Open-Ended Formulations (“other”, “certain”, “including”)**

65. The Defence for Mr Gucati submits that the Confirmed Indictment does not specify what “other actions” the Accused allegedly undertook apart from those listed in paragraph 6 of the same document.<sup>129</sup> The Defence for Mr Gucati further avers that the Confirmed Indictment does not specify which [REDACTED] evidence and what other content were further disseminated, and through what means other than in the press and online.<sup>130</sup> The Defence for Mr Haradinaj joins these submissions.<sup>131</sup>

66. As regards the reference to “other actions”, the SPO responds that the phrase in paragraph 6 of the Confirmed Indictment must be read together with the rest of the document, setting out in detail the alleged conduct of the Accused.<sup>132</sup> As regards the content further disseminated, the SPO submits that the contents and nature of the documents allegedly disclosed at the 7 September 2020 press conference (“First Disclosure”) and at the 22 September 2020 press conference (“Third Disclosure”) are sufficiently described in the Confirmed Indictments and that further detail is both unnecessary and impossible, given the descriptions provided and the alleged public

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<sup>129</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to para. 6 of the Confirmed Indictment.

<sup>130</sup> *Gucati* Preliminary Motion, para. 19, Table 1 referring to the following paras and terms used in the Confirmed Indictment: 12 (“certain contents of the First Disclosure, [REDACTED], were further disseminated, including in the press and online”) and 21 (“contents of the Third Disclosure, [REDACTED], were further disseminated, including in the press and online”).

<sup>131</sup> *Haradinaj* Preliminary Motion, paras 62-64.

<sup>132</sup> SPO Response, para. 9.

and indiscriminate nature of the Accused's statements.<sup>133</sup> The SPO further avers that liability in this case does not depend on the further dissemination of any particular contents, the full scope of which is likely to remain obscure.<sup>134</sup> As regards the means of further dissemination, the SPO submits that, considering the alleged public and indiscriminate nature of the Accused's statements and the size of their audience and potential scope of further dissemination, further specificity is impracticable and impossible on the available evidence.<sup>135</sup>

67. As regards the content further disseminated, the Defence for Mr Gucati replies that if the SPO is unable to specify disseminated confidential content [REDACTED] or means of dissemination other than "in the press and online", then the SPO's case and the terms used in the Confirmed Indictment should be accordingly restricted.<sup>136</sup>

68. As regards the reference to "other actions" in paragraph 6 of the Confirmed Indictment, the Pre-Trial Judge notes that this phrase appears in the third introductory paragraph of the "Statement of Facts" section. As signalled by its opening line "as set out below", the purpose of this paragraph is to summarise the facts underpinning the charges, as set out in the subsequent paragraphs (8-46) of the Confirmed Indictment. In particular, paragraphs 7-20 describe in detail all actions undertaken by the two Accused in relation to the alleged First, Second and Third Disclosures.

69. As regards the content further disseminated, the Pre-Trial Judge notes that the Confirmed Indictment clearly indicates that the allegedly disseminated confidential and non-public information consisted of documents marked "confidential" [REDACTED].<sup>137</sup> Furthermore, the Confirmed Indictment elaborates on the respective

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<sup>133</sup> SPO Response, para. 15.

<sup>134</sup> SPO Response, para. 15.

<sup>135</sup> SPO Response, para. 14.

<sup>136</sup> *Gucati* Reply, paras 13-14.

<sup>137</sup> Confirmed Indictment, para. 6.

content of the First and the Third Disclosure,<sup>138</sup> and clearly indicates that parts of these two disclosures were further disseminated.<sup>139</sup> In this regard, the phrases “[certain] contents [...], [REDACTED]”<sup>140</sup> must be read together with the descriptions of the First and Third Disclosures to mean that part of the confidential information initially disclosed was further disseminated. Since the relevant charged offences depend on the unauthorised revelation of confidential information (Count 5), including [REDACTED] (Count 6), additional details on the specific content disclosed need not be pleaded further in the Confirmed Indictment and can be addressed at trial.

70. As regards the means of further dissemination, the Pre-Trial Judge notes that the manner in which the contents of all three disclosures were initially revealed, *i.e.* through statements made and copies distributed at press conferences and/or other broadcasted events,<sup>141</sup> makes it impracticable to trace all the ways in which such content may have been further disseminated. The Confirmed Indictment pleads further dissemination in the press and online, as evidence of such dissemination exists and forms part of the supporting material.<sup>142</sup> In this regard, the phrases “including in the press and online” signify that, next to the pleaded and known forms of further dissemination, other, unknown forms, may have also occurred.<sup>143</sup> In any event, the unknown forms of further dissemination do not impact on the charged offences or modes of liability.

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<sup>138</sup> Confirmed Indictment, paras 8-9 (content of the First Disclosure) and 17-18 (content of Third Disclosure). *See also* paras 10 (material seized on 8 September 2020), 13-14 (content of Second Disclosure), 15 (material seized on 17 September 2020), and 19 (material seized on 22 September 2020).

<sup>139</sup> Confirmed Indictment, paras 12 (further dissemination of First Disclosure) and 21 (further dissemination of Third Disclosure).

<sup>140</sup> Confirmed Indictment, paras 12, 21.

<sup>141</sup> Confirmed Indictment, paras 8-9, 17-18; Confirmation Decision, paras 100-101.

<sup>142</sup> Rule 86(3)(b) Outline, pp. 4-5, 16.

<sup>143</sup> In fact, the Confirmed Indictment itself points at a possible further dissemination, when referring to Mr Haradinaj’s statement that he would send a copy of the First Disclosure to members of the Kosovo Assembly. Confirmed Indictment, para. 9.

71. The Pre-Trial Judge accordingly finds that the aforementioned open-ended formulations are, in these specific instances, sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability.

## 6. Conclusion

72. In light of the foregoing, the Pre-Trial Judge finds that the Confirmed Indictment sets out with sufficient clarity and specificity the facts underpinning the charges and the crimes, including the modes of liability charged. The Defence's challenges to the form of the Confirmed Indictment are accordingly rejected.

## V. PUBLIC REDACTED VERSIONS

73. The Pre-Trial Judge orders the Defence to file, where not already done so, public redacted versions of their respective preliminary motions and replies by Monday, 15 March 2021, redacting any reference to contents of confidential filings, including redacted passages of the Confirmed Indictment, and to names of SPO staff members.<sup>144</sup>

## VI. DISPOSITION

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

- a. **DISMISSES** the request of Mr Haradinaj for a stay of proceedings;
- b. **REJECTS** the *Gucati* Preliminary Motion;
- c. **REJECTS** the *Haradinaj* Preliminary Motion; and

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<sup>144</sup> SPO Response, para. 20. See also Article 33(3) of the Practice Direction on Files and Filings.



- d. **ORDERS** the Defence to file public redacted versions of their respective preliminary motions and replies, where not already done so, by **Monday, 15 March 2021**.



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

Dated this Monday, 8 March 2021  
At The Hague, the Netherlands.