

**In:** KSC-BC-2020-07  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** Pre-Trial Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Nasim Haradinaj

**Date:** 15 March 2021

**Language:** English

**Classification:** Confidential

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**Application for Leave to Appeal through Certification from Decision KSC-BC-  
2020-07/F00147 pursuant to Article 45(2) and Rule 77(1)**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

## I. CLASSIFICATION

1. **NOTE:** in an abundance of caution, this Appeal is filed as “Confidential” as per the classification of the impugned decision.
2. For the avoidance of doubt, the Defence do not seek a ‘Confidential’ or ‘Strictly Confidential’ classification, and would therefore seek that this filing to categorised as ‘Public’ as the filing of Counsel for Mr. Gucati
3. Further, the Defence maintain that there is nothing within this submission that ought to be redacted.

## II. INTRODUCTION

4. Counsel for Mr. Haradinaj, seek leave to appeal the ‘Decision on Defence Preliminary Motions’,<sup>1</sup> of 8 March 2021.
5. This request for leave to appeal is brought pursuant to Article 45 of the Law on Specialist Chambers and Specialist prosecutor’s Office, Law No.05/L-053 (the “Law”), and Rule 77 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (the “Rules”).

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<sup>1</sup> KSC-BC-2020-07/F00147

6. Counsel for Mr. Haradinaj joins with that which has been submitted by Counsel for Mr. Gucati, and reaffirms the submission made in that filing of 15 March 2021, in that leave is sought on the following primary issues:

- a. That the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars as to the identity of co-perpetrators, given the requirement to provide in the indictment as much detail as possible regarding the identities of any alleged co-perpetrators;<sup>2</sup>
- b. Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars as to the identity of accomplices, given the requirement to provide in the indictment as much detail as possible regarding the identities of any alleged accomplice;<sup>3</sup>
- c. Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of

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<sup>2</sup> See the Impugned Decision at paragraph 41; Prosecutor v Nahimana, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 323; 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.

<sup>3</sup> See the Impugned Decision at paragraph 42; Prosecutor v Nahimana, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 323; 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

further particulars as to the identity of assisted or incited persons, given the requirement to provide in the indictment as much detail as possible regarding the identities of any assisted or incited person;<sup>4</sup>

- d. Whether the Pre-Trial Judge erred in finding that it was not a defect for the Confirmed Indictment to use the formula 'and/or' to refer alternatively to the Accused, unnamed co-perpetrators or unnamed accomplices when attributing actions allegedly undertaken, given the requirement that formulations should not be used which create ambiguity as to the alleged responsibility of the accused;<sup>5</sup> and
- e. Whether the Confirmed Indictment is defective in that it pleads 'unknown' actions which allegedly 'may' have occurred next to 'known' actions which allegedly 'did' occur, given the requirement that open-ended statements in respect of the facts underpinning the charge are not permitted, unless they are exceptionally necessary which is not asserted.<sup>6</sup>

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<sup>4</sup> See the Impugned Decision at paragraph 42; Prosecutor v Nahimana, Appeal Judgment, 28 November 2007, ICTR-99-52-A at paragraph 323; 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

<sup>5</sup> See the Impugned Decision at paragraph 45; Uwinkindi, ICTR, 16 November 2011 at paragraph 48

<sup>6</sup> See the Impugned Decision at paragraph 44

### III. BACKGROUND

7. The chronology is of specific importance in terms of these submissions and therefore the same is repeated in full.
8. On 22 September 2020, the SPO requested the arrest of Hysni Gucati and Nasim Haradinaj, for alleged dissemination of confidential information relating to the work of the SITF and/or the SPO at three press conferences held on 7, 16, and 22 September 2020, and sought their transfer to the detention facilities of the KSC.<sup>7</sup>
9. On 24 September 2020, the Single Judge issued arrest warrants for Mr. Gucati and Mr. Haradinaj in connection with allegations of attempted intimidation of witnesses, retaliation, and violation of secrecy proceedings, and ordered their transfer to the KSC detention facilities.<sup>8</sup>

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<sup>7</sup> Urgent Request for Arrest Warrants and Related Orders, KSC-BC-2018-01, F00125, Strictly Confidential and *ex parte*, with Strictly Confidential and *ex parte* Annexes 1-2, 22 September 2020. A supplement to the Request was submitted on 23 September 2020, Prosecution Notice and Related Request, KSC-BC-2018-01, F00126, Strictly Confidential and *ex parte*, 23 September 2020, with Annex 1, Strictly Confidential and *ex parte*.

<sup>8</sup> Annex 2 - Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, KSC-BC-2020-07, F00012, Public, 24 September 2020.

10. On 25 September 2020, Mr. Haradinaj was arrested and held in detention in the Republic of Kosovo until the following day when he was transferred to the KSC detention facilities.
11. On 29 September 2020, Mr. Haradinaj filed a request for his immediate release from detention.<sup>9</sup>
12. On 27 October 2020, the Single Judge rendered a decision rejecting this request.<sup>10</sup>
13. On 30 October 2020, the SPO submitted an indictment for confirmation against Mr. Haradinaj and Mr. Gucati.<sup>11</sup>
14. On 9 December 2020, the Pre-Trial Judge requested the Parties to file written submissions on Mr. Haradinaj's continued detention, the deadline being 18 December 2020.<sup>12</sup>
15. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment, and ordered the SPO to submit a revised indictment as confirmed.<sup>13</sup>

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<sup>9</sup> Initial appearance, preliminary motion to dismiss the charges and motion for immediate release, KSC-BC-2020-07, F00030, Public, 29 September 2020.

<sup>10</sup> Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07, F00058, Public, 27 October 2020.

<sup>11</sup> Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07, F00063, Strictly Confidential and *ex parte*, 30 October 2020.

<sup>12</sup> Order for Submissions on the Review of Detention, KSC-BC-2020-07, F00073, Public, 9 December 2020.

<sup>13</sup> Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07, F00074/RED, Public, 11 December 2020.

16. On 14 December 2020, the SPO submitted the Confirmed Indictment with redactions.<sup>14</sup>
17. On 18 December 2020, Mr. Toby Cadman was appointed as new Specialist Counsel to Mr. Haradinaj.<sup>15</sup> On the same day, the withdrawal of previous Specialist Counsel was confirmed.<sup>16</sup>
18. On 18 December 2020, Mr. Haradinaj was produced before the KSC where an 'initial appearance' was held.<sup>17</sup>
19. On 18 December 2020, Mr. Haradinaj filed 'Submissions on the Review of Detention by 27 December 2020',<sup>18</sup> the SPO filing its 'consolidated submissions on review of detention' on the same day.<sup>19</sup>
20. On 23 December 2020, the appointment of Specialist Co-Counsel for Mr. Haradinaj, Mr. Carl James Buckley, was confirmed.<sup>20</sup>

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<sup>14</sup> Submission of confirmed Indictment with strictly confidential Annexes 1 and 2, KSC-BC-2020-07, F00075, Public, 14 December 2020.

<sup>15</sup> Notification of the Appointment of Counsel to Nasim Haradinaj with one confidential Annex, KSC-BC-2020-07, F00086, Public, 18 December 2020.

<sup>16</sup> Decision Approving the Withdrawal of Counsel, KSC-BC-2020-07, F00084, Public, 18 December 2020.

<sup>17</sup> Initial Appearance of Nasim Haradinaj, Transcript, KSC-BC-2020-07, 18 December 2020.

<sup>18</sup> Submissions on the Review of Detention by 27 December 2020, KSC-BC-2020-07, F00090, Public, 18 December 2020.

<sup>19</sup> Prosecution consolidated submissions on review of detention, KSC-BC-2020-07, F00088, Public, 18 December 2020.

<sup>20</sup> Notification of Approval of Co-Counsel for Nasim Haradinaj with one confidential Annex, KSC-BC-2020-07, F00092, Public, 23 December 2020.

21. On 24 December 2020, the Pre-Trial Judge refused Mr. Haradinaj's application for release.<sup>21</sup>
22. On 5 January 2021, the Defence for Mr. Haradinaj filed a Notice of Appeal of the Decision on Detention of 24 December 2020 before the Court of Appeals Panel.<sup>22</sup>
23. On 4 January 2021, the SPO claims to have made its Rule 102(1)(a) disclosure.<sup>23</sup>
24. On 6 January 2021, the President of the KSC constituted an Appeals Panel for the Defence Appeal against the Decision on Detention.<sup>24</sup>
25. On 6 January 2021, a Decision was made to order Mr. Haradinaj to attend the first part of the first Status Conference in order to enter a plea.<sup>25</sup>
26. On 7 January 2021, the Defence for Mr. Haradinaj filed its submissions for the Status Conference.<sup>26</sup>
27. On 8 January 2021, the first Status Conference took place.<sup>27</sup>

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<sup>21</sup> Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07, F00094, Public, 24 December 2020.

<sup>22</sup> Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07/IA002/F00001, Public, 4 January 2021 (notified 5 January 2021).

<sup>23</sup> Prosecution Submissions for first Status Conference, KSC-BC-2020-07, F00096, Public, 5 January 2021.

<sup>24</sup> Decision Assigning a Court of Appeals Panel, KSC-BC-2020-07, IA002-F00002, Public, 6 January 2021.

<sup>25</sup> Decision on Defence Request to Hold Hearing in the Absence of the Accused, KSC-BC-2020-07, F00097, Public, 6 January 2021.

<sup>26</sup> Defence Submissions for First Status Conference on Behalf of Nasim Haradinaj, KSC-BC-2020-07, F00099, Public, 7 January 2021.

<sup>27</sup> Status Conference, Transcript, KSC-BC-2020-07, 8 January 2021.



28. On 8 January 2021, the SPO reported on the seized material to the Pre-Trial Judge.<sup>28</sup>
29. On 15 January 2021, the SPO filed its Response to the Defence Appeal against the Decision on Detention of Nasim Haradinaj.<sup>29</sup>
30. On 20 January 2021, the Defence filed its Reply to the SPO Response regarding the Appeal against the Decision on Detention.<sup>30</sup>
31. On 22 January 2021, the Pre-Trial Judge handed down a Framework Decision on Disclosure of Evidence and other Matters.<sup>31</sup>
32. On 29 January 2021, the SPO filed a confidential request for non-disclosure of certain information pertaining to contacts with witnesses.<sup>32</sup>
33. On 1 February 2021, the SPO filed a confidential filing, Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, with confidential annexes.<sup>33</sup>

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<sup>28</sup> Prosecution report pursuant to decisions KSC-BC-2020-07-F00005 and KSC-BC-2020-07-F00007, KSC-BC-2020-07, F00102, Public, 8 January 2021.

<sup>29</sup> Prosecution response to Defence appeal of decision on review of detention of Nasim Haradinaj, KSC-BC-2020-07, IA002-F00003, Public, 15 January 2021.

<sup>30</sup> Defence Reply to Specialist Prosecutor's Response to Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07, IA002-F00004, Public, 20 January 2021.

<sup>31</sup> Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07, F00104, Public, 22 January 2021.

<sup>32</sup> Prosecution request for non-disclosure of certain information pertaining to contacts with witnesses, KSC-BC-2020-07, F00107, Confidential, 29 January 2021.

<sup>33</sup> Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07, F00110, Confidential, 1 February 2021.

34. On 2 February 2021, Counsel for Mr. Gucati filed a Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b).<sup>34</sup>
35. On 3 February 2021, the SPO filed the Prosecution Request for Reclassification of Filing KSC-BC-2020-07-F000113.<sup>35</sup>
36. On 3 February 2020, the Registry informed the Parties that the Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b) submitted by Counsel for Mr. Gucati had been reclassified as Strictly Confidential pending a decision by the Pre-Trial Judge.
37. Counsel for Mr. Haradinaj filed its Preliminary Motion challenging the indictment pursuant to Rule 97(1)(a) and 97(1)(b) and on 8 March 2021 the Pre-Trial Judge issued his decision in respect of those preliminary motions, 'Decision on Defence Preliminary Motions'.<sup>36</sup>

#### IV. THE LAW

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<sup>34</sup> KSC-BC-2020-07/F00113, Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b).

<sup>35</sup> KSC-BC-2020-07/F00114, Prosecution Request for Re-Classification

<sup>36</sup> KSC-BC-2020-07/F00147

38. Counsel for Mr. Haradinaj notes the filing of Counsel for Mr. Gucati at paragraphs 4-10 of that submission, in respect of the law, and adopts the position as submitted.
39. Counsel for Mr. Haradinaj does not seek to add anything further than that which is submitted.
40. Further, there would appear to be no issue of dispute in terms of the law, and the test to be applied in determining whether leave ought to be granted or otherwise.

#### IV. SUBMISSIONS

41. Counsel for Mr. Haradinaj notes the submissions of Counsel for Mr. Gucati in seeking leave to appeal and reaffirms and joins those submissions as per paragraphs 11-24 of that filing.
42. Accordingly, Counsel for Mr. Haradinaj does not seek to rehearse those submissions here.
43. The Defence for Mr. Haradinaj would however seek to the make the following brief additional submissions complimentary to that which has already been filed.

*Whether the issue at hand would significantly affect: (i) The fair and expeditious conduct of the proceedings*

44. Any and all Defendants in criminal proceedings have a right to a fair trial.
45. The issues raised in terms of the 'grounds' of appeal, go the very heart of a fair trial, in that issues are raised concerning the charges themselves and the ability of both Defendant's to understand the charges against them, and thereafter, prepare and adduce a defence to those charges.
46. The Indictment, in its current form, does not specify individuals victims, and further, it is ambiguous in terms of the criminal behaviour that is being complained of.
47. Accordingly, it is respectfully submitted to be abundantly clear that the issues raised have a direct and substantive effect on the 'fair' conduct of proceedings.
48. In terms of the 'expeditious' element of the limb, the Defence for Mr. Haradinaj reaffirms that which has been submitted by Counsel for Mr. Gucati and adopts and joins those arguments raised.

*Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings*

49. As per that submitted by Counsel for Mr. Gucati, the indictment in its current form is prejudicial to the two defendants, in terms of their ability to prepare and thereafter advance a defence.
50. The remedy sought at this stage is for the defects identified to be 'cured', a remedy that is within the remit of the Appeals Chamber.
51. In remedying the defects as pleaded, the Court of Appeal would provide the specificity required so as to ensure the fairness of proceedings on this point, and thus the proceedings would be materially advanced in ensuring both the fairness, and efficiency of proceedings, having regard to that which has been submitted by Counsel for Mr. Gucati at paragraphs 13-17

## VII. CONCLUDING REMARKS

52. The original submissions of Counsel for Mr. Haradinaj in its preliminary motion are maintained for the purposes of the appeal.
53. Further, Counsel for Mr. Haradinaj joins, and adopts, the submissions of Counsel for Mr. Gucati for the purposes of this application for leave to appeal.
54. Having regard to the above, and that which has already been submitted, it is respectfully submitted that the relevant test *per* Article 45(2) of the Law and

Rule 77(2) of the Rules has been satisfied, and accordingly, leave to appeal ought to be granted.

Word Count: 2510 words



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