



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

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

**Before:** Court of Appeals Panel  
Judge Michèle Picard  
Judge Emilio Gatti  
Judge Kai Ambos

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 29 March 2021

**Language:** English

**Classification:** Confidential

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**Prosecution response to Defence appeal of the Decision on Defence Preliminary  
Motions**

**with one annex**

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## I. INTRODUCTION

1. The Court of Appeals Panel ('Panel') should summarily dismiss the Appeal<sup>1</sup> of the Haradinaj Defence, as joined by the Gucati Defence,<sup>2</sup> because it is inadmissible.

2. Even if the Appeal was to be considered on its merits, the arguments are unsubstantiated and misplaced. The Defence misapprehend both the statutory framework and the findings of the PTJ in the Decision.<sup>3</sup>

## II. BACKGROUND AND PROCEDURAL HISTORY

3. On 4 February 2021, the Haradinaj Defence filed a 'Preliminary Motion on the Issue of the Indictment Being Defective'.<sup>4</sup> This request was brought under Rule 97(1)(a) and (b) of the Rules.

4. Under the sub-heading 'Submissions per Rule 97(1)(a)' in the Haradinaj Preliminary Motion, arguments exclusively related to the question of whether offences from the 2019 Kosovo Criminal Code could be applied in this case, given that the Law<sup>5</sup> refers to offences under the 2012 Kosovo Criminal Code.<sup>6</sup>

5. The Haradinaj Defence's 'Submissions per Rule 97(1)(b)' alleged a variety of defects concerning the confirmed indictment,<sup>7</sup> including that: (i) the indictment was confirmed without the Pre-Trial Judge reviewing the contents of the three batches of materials giving rise to this case ('Three Batches')<sup>8</sup> and (ii) the Haradinaj Preliminary

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<sup>1</sup> Appeal in Respect of the Decision on Defence Preliminary Motion, KSC-BC-2020-07/IA003/F00001, 17 March 2021 ('Appeal').

<sup>2</sup> Joinder re Interlocutory Appeal in Respect of the Decision on Defence Preliminary Motion made by Nasim Haradinaj, KSC-BC-2020-07/IA003/F00002, 17 March 2021.

<sup>3</sup> Public Redacted Version of Decision on Defence Preliminary Motions, KSC-BC-2020-07/F00147/RED, 8 March 2021 ('Decision').

<sup>4</sup> Preliminary Motion on the Issue of the Indictment Being Defective, KSC-BC-2020-07/F00116, 3 February 2021 ('Haradinaj Preliminary Motion').

<sup>5</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

<sup>6</sup> Haradinaj Preliminary Motion, KSC-BC-2020-07/F00116, paras 65-67. *See also* Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b), KSC-BC-2020-07/F00113/RED, 2 February 2021 (public redacted version notified 3 February 2021) ('Gucati Preliminary Motion'), paras 16-18.

<sup>7</sup> Haradinaj Preliminary Motion, KSC-BC-2020-07/F00116, paras 68-78.

<sup>8</sup> Haradinaj Preliminary Motion, KSC-BC-2020-07/F00116, paras 68-75.

Motion was filed prematurely because the Three Batches were never disclosed as indictment supporting materials.<sup>9</sup> Under a prior sub-heading entitled 'Submissions Made on Behalf of Hysni Gucati', the Haradinaj Defence joined certain arguments in the Gucati Preliminary Motion.<sup>10</sup> In one of the joined paragraphs, the Gucati Defence set out a table alleging indictment defects, including that (iii) the confirmed indictment failed to sufficiently particularise the witnesses and family members affected by the charged crimes (collectively with (i) and (ii), 'Three Alleged Defects').<sup>11</sup>

6. On 8 March 2021, the PTJ rejected these arguments in the Decision. Following the structure in the Haradinaj Preliminary Motion, the PTJ separated his reasoning into 'Challenges to the Jurisdiction of the Specialist Chambers' and 'Challenges to the Form of the Indictment'. Under the jurisdiction sub-heading, the PTJ resolved all challenges raised as to the application of the 2019 Kosovo Criminal Code. Under the indictment sub-heading, the PTJ resolved, amongst other challenges, the Three Alleged Defects.

7. On 15 March 2021, both Defence teams filed applications for leave to appeal the Decision on grounds concerning defects in the indictment.<sup>12</sup> The SPO responded to these requests on 25 March 2021.<sup>13</sup>

8. On 17 March 2021, the Haradinaj Defence filed the Appeal, raising three grounds. These grounds mirror the Three Alleged Defects rejected in the Decision.

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<sup>9</sup> Haradinaj Preliminary Motion, KSC-BC-2020-07/F00116, para.78, *further referencing* paras 34-44.

<sup>10</sup> Haradinaj Preliminary Motion, KSC-BC-2020-07/F00116, paras 62-64.

<sup>11</sup> Gucati Preliminary Motion, KSC-BC-2020-07/F00113/RED, para.19 (at pp.8, 12).

<sup>12</sup> Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147/RED pursuant to Article 45(2) and Rule 77(1), KSC-BC-2020-07/F00151, 15 March 2021; Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147/RED pursuant to Article 45(2) and Rule 77(1), KSC-BC-2020-07/F00153, 15 March 2021.

<sup>13</sup> Prosecution response to applications for leave to appeal the Decision on Defence Preliminary Motions, KSC-BC-2020-07/F00161, 25 March 2021.

### III. SUBMISSIONS

#### A. THE APPEAL SHOULD BE DECLARED INADMISSIBLE

9. Only certain interlocutory appeals may be filed as of right, as such matters generally require certification of the panel in accordance with Article 45(2) of the Law and Rule 77 of the Rules.<sup>14</sup> Rule 97(1) and (3) sets out the framework as to which preliminary motions are appealable as of right and which are not:

(1) 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).

[...]

(3) Appeals against decisions on preliminary motions under paragraph (1)(a) shall lie as of right pursuant to Article 45(2) of the Law. For all other decisions rendered under paragraph (1), Rule 77 shall apply.<sup>15</sup>

10. In accordance with this framework, only jurisdictional appeals under Rule 97(1)(a) may be filed as of right. Decisions on Rule 97(1)(b) defective indictment applications may only be appealed with certification.

11. Parties cannot simply re-label a matter as a direct appeal in order to circumvent the leave to appeal requirements.<sup>16</sup> As is clear from the background above, this is precisely what the Haradinaj Defence has done. The only Rule 97(1)(a) jurisdictional issue in the Decision concerns the application of the 2019 Kosovo Criminal Code, a matter which the Haradinaj Defence fails to challenge or even mention across its

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<sup>14</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

<sup>15</sup> See also Article 45(2) ('Interlocutory appeals shall lie as of right from decisions or orders relating to detention on remand or any preliminary motion challenging the jurisdiction of the Specialist Chambers.').

<sup>16</sup> ICC, *The Prosecutor v. Callixte Mbarushimana*, Decision on the admissibility of the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 28 July 2011 entitled "Decision on 'Second Defence request for interim release'", ICC-01/04-01/10-438, 21 September 2011, paras 3-9, 17 (dismissing an interim release appeal filed as of right on grounds that it was actually a reframed challenge to the arrest warrant).

grounds of appeal.<sup>17</sup> The only arguments developed in the Appeal are based entirely on the Three Alleged Defects. These arguments all concern defective indictments, as is clear from how they were presented in the Haradinaj Preliminary Motion and resolved in the Decision.

12. When a decision addresses jurisdictional issues appealable as of right alongside other issues, those latter issues require certification.<sup>18</sup> All grounds of appeal raised by the Haradinaj Defence required certification of the PTJ, a fact the Haradinaj Defence is aware of given that it also filed a leave to appeal application concerning defective indictment issues arising from the Decision.

13. As such, the Appeal is inadmissible and should be summarily dismissed by the Panel. Should the Panel consider the Appeal on its merits, the Decision should be affirmed for, *inter alia*, the following reasons.

#### B. FIRST GROUND: THE INDICTMENT WAS CONFIRMED IN ACCORDANCE WITH THE LAW

14. The arguments raised under the first ground of appeal<sup>19</sup> are built from a false premise, namely that - because this case concerns unlawful dissemination of the Three Batches - the PTJ was required to review them in order for the indictment to be validly confirmed. The PTJ explained clearly in the Decision why this was not necessary in the circumstances of this case.<sup>20</sup>

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<sup>17</sup> To summarily assert that the '[t]he original submissions are maintained for the purposes of the appeal' hardly qualifies as providing reasoning or setting forth a basis for an appeal on this jurisdictional point. Appeal, KSC-BC-2020-07/IA003/F00001, para.85. As to the insufficiency of such submissions, *see generally* Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, para.19; ICTY, Appeals Chamber, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para.16.

<sup>18</sup> ICC, *The Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, ICC-02/11-01/11-321, 12 December 2012 (dismissing part of a jurisdictional appeal concerning a stay of proceedings decision – appeal of this decision required leave, even though the stay of proceedings request was resolved in the same decision giving rise to the validly submitted part of the jurisdictional appeal).

<sup>19</sup> Appeal, KSC-BC-2020-07/IA003/F00001, paras 48-63.

<sup>20</sup> Decision, KSC-BC-2020-07/F00147/RED, para.22 (citations removed: '[a]s noted 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. To make such a determination in the present case, the Pre-Trial Judge had to be satisfied, *inter alia*, that the

15. This ground of appeal essentially concerns the sufficiency of the evidentiary basis for confirming the indictment. This is not a matter for a preliminary motion, but for trial. It certainly does not concern the jurisdiction of the KSC.

16. These submissions are also repetitive of arguments raised in the Haradinaj Preliminary Motion.<sup>21</sup> The Haradinaj Defence fails to identify the nature of any error or explain it with any specificity beyond what was argued before the PTJ.

17. These arguments ultimately amount to a mere disagreement with the PTJ's conclusions, and no discernible error is identified.

#### C. SECOND GROUND: THE PRELIMINARY MOTIONS WERE TIMELY MADE AND RESOLVED

18. Under the second ground of appeal,<sup>22</sup> the Haradinaj Defence repeats many of the same arguments as its first ground. To the extent the submissions address any distinct issues, the Haradinaj Defence argues that it filed its preliminary motion prematurely because, in its view, the deadline for filing preliminary motions (within 30 days from disclosure of the indictment supporting materials under Rule 102(1)(a))<sup>23</sup> had yet to run. The reason why the Haradinaj Defence considers the Rule 102(1)(a) disclosure to be incomplete is because it has not been provided the Three Batches.<sup>24</sup>

19. Such submissions continue to misapprehend the statutory framework. As previously indicated, the PTJ did not review the Three Batches when confirming the indictment. They therefore cannot be indictment supporting materials under Rule 102(1)(a).<sup>25</sup>

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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, 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'.

<sup>21</sup> The Haradinaj Defence effectively concedes the repetitive nature of its submissions. *See* Appeal, KSC-BC-2020-07/IA003/F00001, paras 48-49.

<sup>22</sup> Appeal, KSC-BC-2020-07/IA003/F00001, paras 64-70.

<sup>23</sup> Rule 97(2).

<sup>24</sup> Appeal, KSC-BC-2020-07/IA003/F00001, paras 64-66.

<sup>25</sup> Decision, KSC-BC-2020-07/F00147/RED, para.23.

20. Further, as noted in the Appeal,<sup>26</sup> SPO sought a ruling of non-disclosure of the Three Batches. That request was granted,<sup>27</sup> and the Haradinaj Defence did not attempt to seek leave to appeal of that decision. It cannot now attack an adverse disclosure ruling under the guise of a jurisdictional challenge.

21. Further, it is unclear how the alleged error could have any material impact on the indictment findings in the Decision. The Haradinaj Defence was able to file its preliminary motion, and it was considered fully on its merits. It was not found to be untimely by the PTJ.<sup>28</sup> Moreover, the Haradinaj Preliminary Motion's original submissions on this matter did not even concern whether the indictment was defective *per se*, but rather why the proceedings should be stayed until this then outstanding disclosure issue was resolved.<sup>29</sup> This matter far exceeds the scope of a jurisdictional appeal and, given the PTJ's subsequent disclosure ruling on the Three Batches, is moot.

22. The Haradinaj Defence fails to identify any discernible error in the PTJ's approach, or what impact this ruling could have had on the challenged reasoning in the Decision.

D. THIRD GROUND: NO ERROR IS IDENTIFIED AS TO THE PARTICULARS OF THE INDICTMENT

23. As indicated above, as an issue which squarely falls within Rule 97(1)(b), a request for leave to appeal in respect of the matters raised in this ground is currently pending before the PTJ. Despite this, in the Appeal,<sup>30</sup> the Haradinaj Defence repeats a selection of its unsuccessful defective indictment arguments before the PTJ. The PTJ explained why the identification of the witnesses affected by the unlawful

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<sup>26</sup> Appeal, KSC-BC-2020-07/IA003/F00001, para.52.

<sup>27</sup> Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSCBC-2020-07/F00141, 23 February 2021, Confidential.

<sup>28</sup> Decision, KSC-BC-2020-07/F00147/RED, para.24.

<sup>29</sup> Haradinaj Preliminary Motion, KSC-BC-2020-07/F00116, paras 44-49.

<sup>30</sup> Appeal, KSC-BC-2020-07/IA003/F00001, paras 71-82.

dissemination of the Three Batches was not a material fact to be pled in the indictment.<sup>31</sup>

24. As previously stated, the SPO's case against the accused does not depend on the identity of any witness or family member, nor does it rely on any individualised consequence therefor.<sup>32</sup> It was entirely reasonable for the PTJ to conclude that their identities need not be specifically pled in the circumstances of this case. The Defence's arguments also fail to appreciate that the Defence has been provided or will be provided the 'particulars' it seeks – to the extent such information is relevant and available – through the disclosure process, Rule 86(3)(b) outline, confirmation decision, and Rule 95(4) documents. The challenged part of the Decision only determined that such information need not be included in the indictment as a material fact.

25. The Haradinaj Defence fails to articulate why the PTJ's determination was unreasonable, or even the legal/factual/procedural nature of the error alleged.

#### IV. CONFIDENTIALITY

26. This filing is submitted as confidential in accordance with Rule 82(4). The SPO has no objection to this filing and its annex being reclassified as public.

#### V. RELIEF REQUESTED

27. For the foregoing reasons, the Panel should dismiss the Appeal in its entirety.

**Word count: 2,292**



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**Jack Smith**  
**Specialist Prosecutor**

Monday, 29 March 2021  
At The Hague, the Netherlands.

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<sup>31</sup> Decision, KSC-BC-2020-07/F00147/RED, paras 54-60.

<sup>32</sup> Public Redacted Version of Consolidated Prosecution Response to Preliminary Motions, KSC-BC-2020-07/F00120/RED, 10 February 2021 (public redacted version notified 22 February 2021), paras 6, 16.