



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:** 1 April 2021

**Language:** English

**Classification:** **Public**

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**Decision on the Defence Applications for Leave to Appeal  
the Decision on the Defence Preliminary Motions**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Article 45(2) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 77 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

## I. PROCEDURAL BACKGROUND

1. On 8 March 2021, the Pre-Trial Judge issued a decision on the Defence preliminary motions ("Impugned Decision") finding, *inter alia*, that the indictment against Hysni Gucati ("Mr Gucati") and Nasim Haradinaj ("Mr Haradinaj) as confirmed ("Confirmed Indictment") set out with sufficient clarity and specificity the facts underpinning the charges and the crimes, including the modes of liability charged.<sup>2</sup>

2. On 15 March 2021, the Defence filed their respective applications for leave to appeal the Impugned Decision ("Gucati Request", "Haradinaj Request", collectively "Certification Requests").<sup>3</sup>

3. On 25 March 2021, the Specialist Prosecutor's Office ("SPO") submitted a consolidated response to the Certification Requests.<sup>4</sup>

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<sup>1</sup> KSC-BC-2020-07, F00061, President, *Decision Assigning a Pre-Trial Judge*, 29 October 2020, public.

<sup>2</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)*, 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*, 4 February 2021 (incorrectly dated 3 February 2021), confidential; F00147, Pre-Trial Judge, *Decision on Defence Preliminary Motions ("Impugned Decision")*, 8 March 2021, public.

<sup>3</sup> KSC-BC-2020-07, F00151, Defence for Mr Gucati, *Application for Leave to Appeal Through Certification from Decision KSC-BC-2020-07/F00147 Pursuant to Article 45(2) and Rule 77(1) ("Gucati Request")*, 15 March 2021, public; F00153, Defence for Mr Haradinaj, *Application for Leave to Appeal Through Certification from Decision KSC-BC-2020-07/F00147 Pursuant to Article 45(2) and Rule 77(1) ("Haradinaj Request")*, 15 March 2021, confidential.

<sup>4</sup> KSC-BC-2020-07, F00161, Specialist Prosecutor, *Prosecution Response to Applications for Leave to Appeal the Decision on Defence Preliminary Motions ("SPO Response")*, 25 March 2021, public.

4. On 31 March 2021, the Defence for Mr Gucati submitted a reply to the SPO's consolidated response to the Certification Requests.<sup>5</sup>

## II. SUBMISSIONS OF THE PARTIES

5. The Defence for Mr Gucati requests leave to appeal the Impugned Decision on the following issues (collectively, the "Five Issues"):

- (a) Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars 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 ("Issue 1");<sup>6</sup>
- (b) Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of accomplices, given the requirement to provide in the indictment as much detail as possible regarding the identities of any alleged accomplices ("Issue 2");<sup>7</sup>
- (c) Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars 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 persons ("Issue 3");<sup>8</sup>

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<sup>5</sup> KSC-BC-2020-7, F00168, Defence for Mr Gucati, *Reply to Prosecution Response to Applications for Leave to Appeal the Decision on Defence Preliminary Motions (F00161)*, 31 March 2021, public. The Pre-Trial Judge notes that this filing was submitted outside the time limit provided in Rule 76 of the Rules and contains no request for the extension of such time limit pursuant to Rule 9(5) of the Rules.

<sup>6</sup> Gucati Request, para. 3(i).

<sup>7</sup> Gucati Request, para. 3(ii).

<sup>8</sup> Gucati Request, para. 3(iii).

- (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 (“Issue 4”);<sup>9</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 charges are not permitted, unless they are exceptionally necessary, which is not asserted (“Issue 5”).<sup>10</sup>

6. The Defence for Mr Haradinaj joins the aforementioned submissions.<sup>11</sup>

7. The SPO responds that the Certification Requests should be rejected as they fail to meet the requirements for leave to appeal under Article 45 of the Law and Rule 77 of the Rules.<sup>12</sup>

### III. APPLICABLE LAW

8. Pursuant to Article 45 of the Law, a Court of Appeals Panel shall hear interlocutory appeals from an accused or from the Specialist Prosecutor in accordance with the Law and the Rules. Interlocutory appeals, other than those that lie as of right, must be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that they involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in

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<sup>9</sup> Gucati Request, para. 3(iv).

<sup>10</sup> Gucati Request, para. 3(v).

<sup>11</sup> Haradinaj Request, paras 6, 41.

<sup>12</sup> SPO Response, para. 1.

the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

9. Rule 77(2) of the Rules further provides that the Panel shall grant certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, including, where appropriate remedies could not effectively be granted after the close of the case at trial, and for which an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

#### IV. DISCUSSION

##### A. LEGAL TEST

10. A right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met.<sup>13</sup> Interlocutory appeals, interrupting the continuity of the proceedings, are the exception.<sup>14</sup> Considerations that an interlocutory appeal would address

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<sup>13</sup> See also KSC-BC-2020-06, F00172, Pre-Trial Judge, *Decision on the Thaçi Defence Application for Leave to Appeal* (“Thaçi Decision on Leave to Appeal”), 11 January 2021, public, para. 9. Similarly, ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#) (“ICC-01/04-168, Judgment on Extraordinary Review”), 13 July 2006, para. 20.

<sup>14</sup> Thaçi Decision on Leave to Appeal, para. 9. Similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, [Decision Denying Certification to Appeal Decision Under Rule 167 Not to Acquit Hussein Hassan Oneissi and to Stay the Trial – With a Short Separate Opinion of Judge David Re](#) (“Oneissi Decision Denying Certification to Appeal”), 14 May 2018, para. 8; ICC, *Situation in Uganda*, ICC-02/04-01/05-20, [Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58](#) (“ICC-02/04-01/05-20, Decision on Prosecutor’s Application for Leave to Appeal”), 19 August 2005, paras 18-19; ICTR, *Prosecutor v. Ntahobali and Nyiramasuhuko*, ICTR-97-21-T, [Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of the Witnesses RV and QBZ Inadmissible”](#) (“Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal”), 18 March 2004, para. 15.

fundamental questions or would be to the benefit of the Specialist Chambers do not *per se* warrant certifying the appeal.<sup>15</sup>

11. Mindful of the restrictive nature of this remedy, the following specific requirements apply:

- (a) Whether the matter is an “appealable issue”;
- (b) Whether the issue at hand would significantly affect:
  - i. The fair and expeditious conduct of the proceedings, or
  - ii. The outcome of the trial; and
- (c) Whether, in the opinion of the Pre-Trial Judge, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.<sup>16</sup>

12. Only an “issue” may form the basis of an appealable decision. An “issue” has been described as an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion.<sup>17</sup> An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and

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<sup>15</sup> *Thaçi* Decision on Leave to Appeal, para. 9. Similarly, ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-529, [Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521](#) (“Ongwen Decision on Defence Request for Leave to Appeal”), 2 September 2016, para. 8; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-532, [Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”](#), 18 September 2009, para. 12.

<sup>16</sup> *Thaçi* Decision on Leave to Appeal, para. 10.

<sup>17</sup> *Thaçi* Decision on Leave to Appeal, para. 11. Similarly, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 9.

do not amount to abstract questions or hypothetical concerns.<sup>18</sup> It is generally insufficient to argue that the entirety of the Panel's reasoning is erroneous.<sup>19</sup>

13. Not every issue will be certified for appeal. The first prong of the certification test, as set out in (b), contains two alternatives. The issue must have significant repercussions on either (i) "the fair and expeditious conduct of proceedings" or (ii) "the outcome of the trial".<sup>20</sup> Use of the term "significantly" in the wording of the first prong of the certification test indicates that an applicant must not only show how the issue affects (i) the fair and expeditious conduct of proceedings, or (ii) the outcome of the trial, but must also demonstrate the (significant) degree to which these factors are affected.<sup>21</sup> The issue must be one likely to have repercussions on either of the above two elements.<sup>22</sup>

14. The "fair and expeditious conduct of proceedings" is generally understood as referencing the norms of fair trial.<sup>23</sup> Fairness is preserved when a party is provided with the genuine opportunity to present its case and to be apprised of and comment on the observations and evidence submitted to the Panel that might influence its decision.<sup>24</sup> The principles of a fair trial are not confined to trial proceedings but extend

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<sup>18</sup> *Thaçi* Decision on Leave to Appeal, para. 11. Similarly, ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-75, [Decision on the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber III's Decision on Disclosure](#) ("Bemba Decision on Prosecutor's Application for Leave to Appeal"), 25 August 2008, para. 11.

<sup>19</sup> *Thaçi* Decision on Leave to Appeal, para. 11. Similarly, ICC, [Ongwen Decision on Defence Request for Leave to Appeal](#), para. 6; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-596, [Decision on the Joint Defence Request for Leave to Appeal the Decision on Witness Preparation](#), 11 February 2013, para. 11.

<sup>20</sup> Similarly, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 10.

<sup>21</sup> *Thaçi* Decision on Leave to Appeal, para. 12. Similarly, ICTR, [Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal](#), para. 16.

<sup>22</sup> *Thaçi* Decision on Leave to Appeal, para. 12. Similarly, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 10.

<sup>23</sup> *Thaçi* Decision on Leave to Appeal, para. 13. Similarly, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 11.

<sup>24</sup> Similarly, ICC, [Bemba Decision on Prosecutor's Application for Leave to Appeal](#), para. 14.

to pre-trial proceedings as well as the investigation of a crime.<sup>25</sup> Expediousness, i.e. conducting a trial within a reasonable time or, put differently, conducting a speedy trial without prejudice to the rights of the parties concerned,<sup>26</sup> is but one attribute of a fair trial.<sup>27</sup> “Proceedings” referenced in both the first and second prongs of the test for certification refer to the entirety of the judicial process before the Specialist Chambers.<sup>28</sup>

15. Alternatively, the first prong of the certification test may be met if the issue significantly affects the outcome of proceedings. Thus, it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case. The exercise involves a forecast of the consequence of such an occurrence.<sup>29</sup>

16. The second prong of the test for certification is an additional limiting factor. Because of the test’s cumulative nature, the failure of an applicant to establish the first prong of the test will necessarily exempt the Panel from considering whether the second prong has been met.<sup>30</sup>

17. The second prong of the test for certification requires a determination that prompt referral of an issue to the Court of Appeals Panel will settle the matter and rid the “judicial process of possible mistakes that might taint either the fairness of

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<sup>25</sup> *Thaçi* Decision on Leave to Appeal, para. 13. *Similarly*, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 11.

<sup>26</sup> *Similarly*, ICC, [Bemba Decision on Prosecutor’s Application for Leave to Appeal](#), paras 17-18.

<sup>27</sup> *Thaçi* Decision on Leave to Appeal, para. 13. *Thaçi* Decision on Leave to Appeal, para. 13. *Similarly*, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 11.

<sup>28</sup> *Similarly*, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), paras 12, 17.

<sup>29</sup> *Thaçi* Decision on Leave to Appeal, para. 14. *Similarly*, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), para. 13.

<sup>30</sup> *Thaçi* Decision on Leave to Appeal, para. 15. *Similarly*, ICC, [ICC-02/04-01/05-20, Decision on Prosecutor’s Application for Leave to Appeal](#), paras 20-21; ICTR, [Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal](#), paras 23-24.



proceedings or mar the outcome of the trial” thereby moving the proceedings forward along the right course.<sup>31</sup>

18. Lastly, certification is not concerned with whether a decision is correctly reasoned, but whether the standard for certification has been met.<sup>32</sup> The decision examining a request for leave to appeal is not an opportunity to explain the contested decision to the parties. However, where necessary, the Panel will provide clarifications if it is clear that a misrepresentation of the decision so warrants.<sup>33</sup>

## B. THE FIVE ISSUES

19. The Defence for Mr Gucati submits that the Five Issues constitute “appealable issues”, as they emanate from the Impugned Decision and do not amount to abstract questions or hypothetical concerns. The Defence for Mr Gucati further avers that the Five Issues relate to the identifiable subject of the Confirmed Indictment and whether it is defective.<sup>34</sup>

20. The SPO responds that none of the Five Issues are appealable, because they are framed in the same way, alleging that the Pre-Trial Judge erroneously applied the referenced law and no further specificity is given as to the alleged errors. The SPO further submits that such argumentation is tantamount to challenging the entirety of

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<sup>31</sup> *Thaçi* Decision on Leave to Appeal, para. 16. Similarly, ICC, [ICC-01/04-168, Judgment on Extraordinary Review](#), paras 14-16, 18-19.

<sup>32</sup> *Thaçi* Decision on Leave to Appeal, para. 17. Similarly, STL, [Oneissi Decision Denying Certification to Appeal](#), para. 8; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, [Decision on Accused’s Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 Bis](#), 18 July 2012, para. 6; ICTR, *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, [Decision on Defence Motion for Leave to Appeal the Trial Chamber’ Decision on the Defence Request to Call Prosecution Investigators](#), 10 May 2011, para. 12.

<sup>33</sup> *Thaçi* Decision on Leave to Appeal, para. 17. Similarly, ICC, [Bemba Decision on Prosecutor’s Application for Leave to Appeal](#), para. 9.

<sup>34</sup> Gucati Request, paras 11-12.

the Pre-Trial Judge's reasoning on these points and is insufficiently discrete to constitute appealable issues.<sup>35</sup>

21. The Pre-Trial Judge considers that the Five Issues arise from the Impugned Decision as they contest the following specific findings therein: (i) that 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 (Issues 1-3);<sup>36</sup> (ii) that the alternative formulations ("and/or") used in relation to the Accused, co-perpetrators or accomplices are, in the specific instances of the Confirmed Indictment, sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability (Issue 4);<sup>37</sup> and (iii) that open-ended formulations used in relation to known and unknown forms of further dissemination are, in the specific instances of the Confirmed Indictment, sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability (Issue 5).<sup>38</sup>

22. Furthermore, the Pre-Trial Judge considers that the Five Issues are not mere disagreements with the Impugned Decision, nor are they hypothetical or abstract questions. On the contrary, the Five Issues identify discrete topics regarding the interpretation and application of the legal standards on specificity and clarity of indictments in respect of the aforementioned findings. Accordingly, the Five Issues identify discrete topics the resolution of which is essential for determination of the matters arising in the judicial cause under examination, *i.e.* the specificity and clarity of the Confirmed Indictment.

23. The Pre-Trial Judge accordingly finds that the Five Issues are appealable.

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<sup>35</sup> SPO Response, para. 4.

<sup>36</sup> Impugned Decision, paras 41-42, 51-53.

<sup>37</sup> Impugned Decision, paras 45, 63-64.

<sup>38</sup> Impugned Decision, paras 44, 70.

C. WHETHER THE ISSUES WOULD SIGNIFICANTLY AFFECT THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS OR THE OUTCOME OF THE TRIAL

24. The Defence for Mr Gucati submits that the extent to which the Confirmed Indictment is pleaded informs the Accused of the charges against him so that he may prepare his defence. The Defence for Mr Gucati further submits that whether or not the Confirmed Indictment is sufficient goes directly to the fair and expeditious conduct of the proceedings and that such fairness and expeditiousness can only be enhanced significantly if it is made certain who the Accused is alleged to have committed offences through or with and what the Accused himself is alleged to have specifically done.<sup>39</sup> The Defence for Mr Gucati also submits that in the absence of further particulars being provided, the trial process runs the risk of being diverted by having to explore in an unfocussed manner the widest possible candidacy for allegations of co-perpetrators, accomplices, assisted or incited persons as well as allegations of conduct which may or may not have taken place, and which may or may not be attributable to the Accused.<sup>40</sup>

25. The Defence for Mr Haradinaj joins these submissions,<sup>41</sup> and adds that the issues raised go to the very heart of a fair trial, as they concern the charges themselves and the ability of the Accused to understand such charges and prepare a defence.<sup>42</sup> The Defence for Mr Haradinaj further avers that the Confirmed Indictment does not specify individual victims and is ambiguous in terms of the criminal behaviour alleged.<sup>43</sup>

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<sup>39</sup> Gucati Request, paras 13-14.

<sup>40</sup> Gucati Request, paras 15-16.

<sup>41</sup> Haradinaj Request, paras 6, 41, 48.

<sup>42</sup> Haradinaj Request, paras 44-45.

<sup>43</sup> Haradinaj Request, para. 46.

26. The SPO responds that the Five Issues concern information which the Pre-Trial Judge considered was best addressed at trial and that the Defence has been or will be provided with the particulars it seeks to the extent such information is relevant and available.<sup>44</sup> The SPO accordingly submits that the Five Issues can have no impact on the fairness and expeditiousness of the proceedings or the outcome of the trial.<sup>45</sup>

27. The Pre-Trial Judge considers that the Five Issues, by contesting the aforementioned findings of the Impugned Decision regarding the specificity and clarity of the Confirmed Indictment, implicate questions of adequate and timely notice of charges to the Accused, as enshrined in Article 21(4) of the Law. In this regard, the Pre-Trial Judge recalls that the adequacy and timeliness of such notice affect the ability of the Accused to understand the charges and prepare a defence in this regard.<sup>46</sup> Moreover, given that the Confirmed Indictment defines the scope of the trial,<sup>47</sup> adequate and timely notice of the charges provides the Accused with a genuine opportunity to challenge the SPO's case and present his defence, as well as to be tried within a reasonable time, guarantees which are at the core of and significantly affect fair and expeditious proceedings.

28. The Pre-Trial Judge accordingly finds that the Five Issues would significantly affect the fair and expeditious proceedings.

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<sup>44</sup> SPO Response, para. 7.

<sup>45</sup> SPO Response, para. 7.

<sup>46</sup> KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of the Decision on the Confirmation of the Indictment*, 11 December 2020, public, para. 26.

<sup>47</sup> KSC-BC-2020-06, F00010, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 2 July 2020, public, para. 12.

D. WHETHER AN IMMEDIATE RESOLUTION BY THE APPEALS CHAMBER MAY MATERIALLY ADVANCE THE PROCEEDINGS

29. The Defence for Mr Gucati submits that an accused should not be required to wait for a post-conviction appeal for a finding that a defective indictment might be cured.<sup>48</sup> The Defence for Mr Gucati further avers that leave to appeal should be granted to permit the Court of Appeals Panel to consider whether the Confirmed Indictment is defective and, if so, to order that it is cured at this stage.<sup>49</sup>

30. The Defence for Mr Haradinaj submits that, in remedying the defects of the Confirmed Indictment, the Court of Appeals Panel would provide the specificity required so as to ensure the fairness of proceedings and that the proceedings are materially advanced.<sup>50</sup>

31. The SPO responds that as any issues in understanding the Confirmed Indictment can be resolved in the course of trial, an interlocutory appeal on alleged defects therein is not necessary to ensure that the proceedings are on the right course.<sup>51</sup> The SPO further avers that given the upcoming steps in the pre-trial proceedings and the short period of time in which trial proceedings are anticipated to be concluded, the Defence will have adequate and timely opportunity to raise procedural issues in the context of a final appeal and for that reason, granting an appeal on any of the Five Issues would not materially advance the proceedings.<sup>52</sup>

32. The Pre-Trial Judge considers that matters regarding the specificity and clarity of an indictment and, by implication, the adequacy and timeliness of notice of the charges, which may significantly affect fair and expeditious proceedings, would benefit from an authoritative determination by the Court of Appeals Panel at the

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<sup>48</sup> Gucati Request, para. 21.

<sup>49</sup> Gucati Request, para. 24.

<sup>50</sup> Haradinaj Request, paras 50-51.

<sup>51</sup> SPO Response, para. 9.

<sup>52</sup> SPO Response, paras 10-11.

earliest opportunity in the proceedings for two reasons. First, such a determination would provide legal certainty as to the discrete topics regarding the interpretation and application of the legal standards on specificity and clarity of indictments in respect of the aforementioned findings. Secondly, such a determination could minimise subsequent delays and the diverting of resources during trial and appeal proceedings to address claims regarding inadequate notice.

33. The Pre-Trial Judge accordingly finds that an immediate resolution by the Court of Appeals Panel in relation to the Five Issues may materially advance the proceedings.

#### E. CONCLUSION

34. In light of the foregoing, the Pre-Trial Judge finds that the Five Issues would significantly affect the fair and expeditious conduct of the proceedings and an immediate resolution by the Court of Appeals in their regard may materially advance the proceedings. The Pre-Trial Judge accordingly certifies the Five Issues under the parameters provided in paragraph 21.

#### V. RECLASSIFICATION

35. The Pre-Trial Judge notes that the Defence for Mr Haradinaj filed its application for leave to appeal confidentially, with reference to the confidential classification of the Impugned Decision.<sup>53</sup> The Pre-Trial Judge further notes that a public redacted version of the Impugned Decision was filed on the same day with the confidential

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<sup>53</sup> Haradinaj Request, para. 2.

version.<sup>54</sup> The Pre-Trial Judge accordingly finds it appropriate to reclassify the Haradinaj Request as public.

## VI. DISPOSITION

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

- a. **GRANTS** the Gucati Request and **CERTIFIES** the Five Issues listed in paragraph 5 under the parameters provided in paragraph 21; and
- b. **ORDERS** the Registry to reclassify the Haradinaj Request (F00153) as public.



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

Dated this Thursday, 1 April 2021  
At The Hague, the Netherlands.

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<sup>54</sup> Impugned Decision, *see* Registry stamp on filing.